Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

MARIO RUIZ MASSIEU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FFITH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does 19 U.S.C. § 1615 require the Government to establish that the Government had probable cause for forfeiture at the time the complaint for forfeiture was filed and preclude use of post filing evidence.

In a civil forfeiture action, is the constitutional due process requirement for notice and an opportunity to defend violated by failing to disclose the witnesses and factual basis for the forfeiture action until less than five days before trial.

In a civil forfeiture action, is Claimant denied a fair hearing, and therefore, due process, when the Government is permitted to present testimony from alien witnesses testifying in exchange for the benefit of permanent residence status in the United States.

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2. **In a civil forfeiture action, due process requires that the owner of property sought to be forfeited be given notice of the factual basis of the Government's claims and an opportunity to prepare a defense utilizing the tools routinely available to civil litigants. A failure to disclose the identity of witnesses and the factual basis of the forfeiture action until less than five days before trial violates due process** 19

3. **In a civil case in which the Government has a pecuniary interest, permitting the Government to secure witnesses by promising witnesses benefits only the Government can grant threatens the integrity of the judicial process and brings the fairness of the justice system in to question and disrepute** . . . 22

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on December 15, 1998, in United States v. $9,041,598.00 In U. S. Currency, 163 F.3d 23[illegible] (5th Cir. 1998). See Appendix C at page 33a.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 163 F.3d 238 (5th Cir. 1998). A copy of the Opinion is included in the Appendix at Appendix C. The Opinion of the District Court for the Southern District of Texas is published at 976 F.Supp 642 and is printed in Appendix B. The District Court ordered entry of the final judgment on April 25, 1997, which is printed in Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on December 15, 1998. On January 27, 1999, Petitioner filed a Petition For Rehearing which the United States Court of Appeals denied on February 18, 1999. (Appendix D). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution

> No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1615 of Title 19 of the United States Code:

> In all suits or actions ... brought for the forfeiture ... the burden of proof shall be upon the defendant; Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court....

Section 201(c)(2) of Title 18 of the United States Code

> © Whoever...(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon trial...before any court...shall be fined under this title or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

This is a forfeiture action in which the Government asserted a right to forfeit $9,041,598.68 which had been seized from Mario Ruiz Massieu's account in the Texas Bank of Commerce. (R. Doc. #1). The seizure occurred on March

13, 1995, pursuant to a sealed affidavit (R. Doc. #35, Ex. 3) which was never fully disclosed to Petitioner. (R. Doc. #207, p. 4). Despite the fact the Government had a substantial pecuniary interest in the case, the District Court "indulged the government" by tolerating blanket non disclosure by the Government of the Government's factual basis for its claim until 5 or 6 weeks before trial, ordering discovery in a manner that gave the Government substantial advantage, permitting the Government to proceed on the basis of sealed filings and allowing the Government to use the purchased testimony of witnesses disclosed to Petitioner for the first time less than five days before trial. Even findings by the Trial Court granting a seven month stay were and remain sealed.

The forfeiture complaint was filed June 15, 1995. (R. Doc. #1). Both the Government and Petitioner served interrogatories and requests for production on the opposing party in June, 1995. Petitioner's interrogatories sought such basic information as the names of persons with knowledge of relevant facts, the identity of experts, and the factual basis for the Government's claims. (R. Doc. #49, Exhibit A). The requests for production sought parallel production. (R. Doc. #49, Exhibit B). Petitioner was required to answer the Government's interrogatories by August, 1995. From June, 1995, to February, 1997, less than a month before trial, the Government successfully blocked Petitioner from conducting any discovery except a limited deposition on written questions to obtain Petitioner's bank records from Texas Commerce Bank. (R. Doc. #22; 24).[1]

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[1] The Court's indulgence for almost one and one/half years of the Government's absolute refusal to provide CTR's or CMIR's in discovery is a clear example of the unfair and unreasonable manner in which discovery was ordered. In its complaint, the

Throughout the pendency of the forfeiture, Petitioner was under the shadow of a government action seeking his removal from the United States. Beginning in March 1995, the Government filed four separate extraditions against Mario Ruiz Massieu. (R. Doc. #49, Exhibits C, D, E and F). On December 25, 1995, after the Government lost its last Extradition Application, the Government gave Petitioner notice to show cause why he should not be deported. (R. Doc. #49, Ex. J). Throughout the District Court proceeding, Petitioner's defense was impeded by the Government's insistence on its right to secret filings and to dictate the order and scope of discovery. Due to the threat that he would be removed from the country before trial on the forfeiture action, Petitioner diligently sought a speedy trial and to expedite discovery on the factual basis of the Government's claims. (See R. Doc. #49, 58, 59, 71, 73, 98, 99).

Based on secret affidavits that the Government apparently later told the District Court were inaccurate,[2] the

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Government purported to outline the CTR's and CMIR's. (R. Doc. #1). If the summary was accurate, disclosure of the documents would merely confirm the Government's summary. The Government withheld the CTR's and CMIR'S which identified Petitioner as the owner of the currency and precluded Petitioner from obtaining the CTR's in the Bank's deposition. At the same time, the Government attacked Petitioner's standing. The CTR's and CMIR's were relevant to standing. In blocking production of the CTR's and CMIR's, the Government engaged in procedural gamesmanship designed to deprive Petitioner of relevant evidence.

[2] The reason for the stay became inoperative at some point and the Court was given notice but chose not to vacate the stay until Petitioner filed an Application for Mandamus. (Doc. #114, pp. 34-35). The date on which the Government informed the Court of

Government was able to obtain a seven month stay of the forfeiture action while the Government continued to pursue its efforts to deport Petitioner.[3] At the hearing on the Government's Motion To Stay, Petitioner was required to offer evidence to rebut the Government's affidavits without knowing what was in the affidavits. Petitioner's counsel requested copies of the sealed affidavits forming the basis for the Stay. Counsel observed that he did not know the basis for the motion and so could not respond. (Doc. #77, pp. 6-8). Denying Petitioner's request, the Court said:

> We definitely have a chicken and egg problem. I am asking you to put on the record what you have in the form of evidence. I am not permitting you at this time to review any such in camera submissions by the Government.

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changed circumstances is unknown to Petitioner because of the ex-parte, sealed filings. (See Doc. #90, 93, 94, 95).

[3] The District Court dismissed Petitioner's concern that he may be deported before trial in the forfeiture action with the observation that his testimony could be "memorialized by deposition ... obviously that is something that the Court or fact finder jury can absorb, if necessary, at the time of trial, if Mr. Massieu should not be able to be present personally." (R. Doc. #80, p. 4). The Court gave no weight to Petitioner's inability to address the Government's trial theory which had not yet been disclosed to Petitioner. The District Court's failure to give weight to the prejudice to Petitioner is explained by the Court's view that "[a]t this point in time the Claimant is nothing more than that, a Claimant to the funds. His standing has been determined; his claim and its validity need to be determined at an appropriate point in time." (R. Doc. #79, p. 2). In other words, until Petitioner proved the validity of his claim, fair notice and a meaningful opportunity to contest forfeiture were of limited moment.

(R. Doc. #96, p. 8).

The Court found "the material that I have reviewed is considered by me in the light of Mr. Canales' testimony. **His testimony does not rebut the showing that has been made by the materials that I have reviewed."** (Doc. #79, p. 2). That is, the District Court rejected Petitioner's Counsel's testimony because his testimony did not rebut evidence he was never been permitted to review. The District Court stayed the forfeiture case until January, 1997.

After Petitioner filed an Application For Writ of Mandamus to the Fifth Circuit Court of Appeals, the District Court held the December 11, 1996, telephone conference on Petitioner's Motion For Speedy Trial and set the case for trial March 10, 1997. (R. Doc. #234, p. 19).

In a hearing January 31, 1997, the Court acknowledged that there had been "blanket non-disclosure" by the Government (R. Doc. #114, p. 20) ; noted that 5 or 6 weeks remained before trial (Doc. #114, p. 27) but again rejected Petitioner's request for immediate discovery and ordered that the Government could depose Petitioner a second time before responding to Petitioner's discovery.[4] The Court

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[4] The Court did so on the mistaken assumption that Petitioner's claim bore "virtually very little relationship to what the Government intend[ed] to prove..." (Doc. #114, p. 28). In fact, Petitioner has consistently testified that he received the currency from his brother, Jose Francisco Ruiz-Massieu. The Government's theory at the time of the second deposition, as set forth in its answers to interrogatories, was that Jose Francisco and the Salinas Family were involved in drug trafficking and payoffs and Mario was Jose Francisco's bag man. The Government insured that Petitioner would have no opportunity to marshal his thoughts or

observed "I have indulged the government". (R. Doc. #114, p. 39). The Court delayed the Government's response to Petitioner's discovery until three days after Petitioner's second deposition. The Court observed that "the government is going to be listing the witnesses and the matters in detail three days after completion of Mario Ruiz Massieu's deposition a month before trial." (Doc. #114, p. 39). Petitioner's counsel received the Government's initial discovery answers on February 9, 1997.

In mid February, 1997, an issue arose regarding information leaked to the press regarding prospective witnesses. Both parties asserted prejudice from the leak and attributed responsibility for the leak to the other party. The Court observed "I cannot make a decision as to the source of leaks based on the current record..." (Doc. #125, p. 21). "As far as I'm concerned this leak is of unknown origin." (Doc. #125, p. 38). Although the District Court characterized the leak as of unknown origin and acknowledged with regard to Petitioner, "there is no reason that I have to suspect him..." (R. Doc. #238, p. 19), the District Court clearly held Petitioner responsible for the leak and did so because he failed to prove a negative: "I am telling you as we sit here I have absolutely nothing in this record as any proof, not even an assertion that he has not turned over the material." (R. Doc. #238, p. 16). When Petitioner's counsel attempted to make such an assertion, the Court rejected counsel's attempt. (R. Doc. #238, p. 16). The Court ordered the depositions of the government witnesses sealed without copies being provided to

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refresh his memory regarding dates, times, places and people before being ambushed in the deposition.

counsel for Petitioner. (Doc. #123).[5] On February 26, 1997, Petitioner argued his motion for copies of the sealed depositions (Doc. #134) and complained of the unfairness of last minute disclosures and the inability to rebut. (Doc. #238, p. 23). The Court approved release of portions of depositions and authorized the Government to determine what should remain sealed. (Doc. #138).

At 5:00 p.m. on March 5, 1997, two business days and less than five full days before trial, the Government disclosed four new informant witnesses, two of whom -- Macias and Dominguez -- testified at trial. The Government knew of the witnesses in January and February but intentionally withheld their identities[6]. On March 7,

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[5] The Court provided that "Counsel may review the sealed transcript in the Courthouse." (Doc. #124). Such a limitation was no hardship for counsel for the Government who had offices in the courthouse and checked out the transcripts for days. (Doc. #216). It imposed an enormous burden on Petitioner's counsel.

[6] The Government admits having knowledge of the four potential witnesses well before the March 5 disclosure and intentionally withholding the names because "it did not intend to call [them] at the forfeiture trial." (Government's Brief on Appeal, p. 12) (R. Doc. #238, p. 8). The Government felt no obligation to identify persons with knowledge but exercised the option of identifying only those persons the Government may want to use. Non-governmental civil litigants do not have the luxury of identifying only those witnesses they intend to call and withholding the names of other witnesses. It is difficult to credit the Government's claim that it did not intend to use Macias as a witness. Macias claimed to be an eye witness to a direct pay off to Petitioner. The only reasons Petitioner can conceive that such an eye witness would not be identified in a timely manner are either that the Government had information regarding impediments that

Petitioner moved to exclude the witnesses on the basis that:

> The late disclosure forced inadequate depositions [of other witnesses] and precluded investigation of the witnesses' allegations and development of impeachment and rebuttal testimony. It is wholly inconsistent with basic principles of due process to allow such trial by ambush. The damage to the integrity of the judicial process is increased when the witnesses are providing testimony in exchange for benefits only the government can give.

(Letter Brief of March 7, 1997). The Court denied Petitioner's motion and sharply limited the depositions of the new witnesses. (Doc. #181). The Court notified the parties: "I am very definite. This Trial will not be suspended for any purpose."

Trial began March 10, 1997. Petitioner objected to the probable cause hearing and jury trial being conducted in one proceeding and objected to the order of trial in which the Government went first in voir dire, opening argument and presentation of evidence before jury. (Doc. #207, p. 63). Petitioner moved to strike the testimony of late disclosed witnesses based on the untimely disclosure and on the basis that their testimony was purchased. The District Court denied Petitioner's motion.

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made it ethically dubious to call Macias a witness or the Government sought to preserve the element of surprise. Neither reason is a valid reason.

The District Court discussed the status of probable cause as of the June 15, 1995. The Court observed "it just barely gets over the line as the defendant currency, but I find that it is sufficient as of the June 15th, 1995." (R. Doc. #212, p. 1532). The District Court's finding of probable cause as of the trial date relied heavily on the testimony of Dominguez and Macias[7] and characterized the testimony as "unrebutted."[8] (R. Doc. #214, p. 21).

STATEMENT OF FACTS

Petitioner Mario Ruiz Massieu was a Deputy Attorney

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[7] The principal individuals on whose testimony the Court based a finding of a conspiracy involving Petitioner were Ortiz, Dominguez and Macias. (R. Doc. #210, p. 1042). Ortiz's "unrebutted" testimony was that he did not know Petitioner; had been in jail from May, 1993 to the trial; and believed everyone in the Mexican Law Enforcement establishment was corrupt; and everyone in the United States Law Enforcement establishment was corrupt except Janet Reno. (R. Doc. #208, pp. 421-422; 428; R. Doc. #209, p. 449).

[8] The Government's eleventh hour identification of four fact witnesses was calculated to preclude effective rebuttal. The late disclosure precluded Petitioner from doing even a routine background investigation of the witnesses to determine whether they had criminal convictions; held the positions they claimed to hold; left under the circumstances they claimed; could have been in the places they claimed; were involved in other proceedings; or the circumstances under which they were recruited to testify. The calculated last minute production of the witnesses precluded such elementary investigative steps as contacting the hotel where Macias claimed to have stayed to determine if any record of the event existed or checking whether over 17 of Dominguez' co-workers were in fact murdered as Dominguez claimed.

General of Mexico from June 1993 to June, 1994 and then from July, 1994 through November, 1994. (Opinion, App. C, p. 39a). During Petitioner's service as Deputy Attorney General, Petitioner's brother, Jose Francisco Ruiz Massieu, was assassinated. As part of his official duties, Petitioner investigated his brother's death. When Petitioner concluded his investigation was being impeded for political reasons, Petitioner wrote a book denouncing the interference and thereafter resigned in protest.

The investigation which resulted in the seizure and forfeiture of the $9,041,598.36 was instituted at the request of the Mexican government. (R. Doc. #210, pp. 971-974; 991). The funds were the subject of currency monetary instrument reports (CMIR) filed at the Border and currency transaction reports (CTR) filed with the Bank. The CMIR's and CTR's identified Mario Ruiz Massieu as owner of the funds.

At trial the Government focused on events occurring in Mexico and stipulated that it was not alleging that the deposits into Texas Commerce Bank were transactions under 18 U.S.C. Section 1956. (Doc. #210, p. 1024). As explained by Assistant U. S. Attorney Rodriguez,

> The financial transactions are the ones that were occurring in Mexico between the drug dealers to the Comandantes, the money moving up the chain, so to speak, all the way to the trunk of Mario Ruiz Massieu. The transfer of money from person to person is a transaction, according to the Statute. These are the transactions for 1956.

(R. Doc. #210, p. 1024). The Government's essential theory

was stated by AUSA Rodriguez:

> "Judge, our theory has been and is that Mr. Massieu pretty much entered an ongoing conspiracy, that is, a drug trafficker paying bribes to Mexican officials, including all the way to the Attorney General's office, and that as bribes were paid, even through comandantes changed, payment would be given on to the new comandantes, whoever took over. The position would continue to accept the payments for bribes..."

(Doc. #208, p. 397). The Government's theory is flawed for a number of reasons. The events cited by the Government occurred outside the United States and involved foreign nationals. The statutes relied on by the Government should not be construed as permitting the United States to forfeit property belonging to foreign nationals for acts which occurred in a foreign country. Further, under the Government's theory, any Mexican government law enforcement official with funds deposited in the United States could be subject to a forfeiture action because it is the position that receives the corrupt funds. This is guilt by association.

REASONS FOR GRANTING THE WRIT

1. There is a split in the Circuit Courts of Appeals on whether 19 U.S.C. § 1615 permits the Government to rely upon evidence acquired after institution of the forfeiture proceeding to establish probable cause for forfeiture. The better reasoned position, consistent with the express language of § 1615, is that the Government is restricted to evidence acquired at the time of the complaint.

At all stages of civil forfeiture, the Government enjoys overwhelming advantages. Property may be seized and held indefinitely on the basis of sealed affidavits never disclosed to the Petitioner. Once the Government seizes the asset, it is the responsibility of the owner to challenge the seizure in a costly hearing in which the prospect of success is dim. The burden on the Government is merely to establish probable cause that the property is subject to forfeiture under some statutory theory and probable cause may be established by third and fourth hand hearsay[9]. Once probable cause is established, Claimant bears the burden of overcoming the Government's case by preponderance of the evidence resting on legally competent evidence and not hearsay. The one sided nature of the forfeiture process has caused thoughtful jurists and legal commentators "to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in these statutes." **United States v. All Assets of Statewide Auto Parts, Inc. 971 F.2d 896 (2d Cir. 1992).**[10] It is essential that the few weak protections provided to a claimant under 19 U.S.C. § 1615 be zealously guarded.

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[9] See e.g., **United States v. $129,727.00, 129 F.3d 486 (9th Cir.) cert. denied, 118 S.Ct. 1399 (1997)** [upholds probable cause based on hearsay tip from citizen informant to Deputy Sheriff to DEA Agent]; **United States v. $149,442.43, 965 F.2d 868 (10th Cir. 1992)** [Multiple hearsay may be used to establish probable cause].

[10] **United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993) cert. denied, 510 U.S. 1191 (1994);** Eric Blumenson and Eva Welson, "Policing for Profit: The Drug War's Hidden Economic Agenda", 65 U. CHI. L.Rev. 35 (Winter 1998).

Section 1615 of Title 19 of the United States Code provides the burden of proof in forfeiture proceedings. See 21 U.S.C. § 881(d). Under Section 1615, claimant has the burden of proof by a preponderance of the evidence subject to a significant statutory requirement: "Provided, that **probable cause shall first be shown for the institution of such suit or action**, to be judged by the Court." 19 U.S.C. § 1615. (Emphasis added). There is a split among the Circuit Courts of Appeals whether § 1615 permits the Government to rely upon evidence acquired after the institution of the forfeiture action or restricts the Government to evidence acquired at the time of the complaint. The Ninth, First and Eight Circuits have held that the Government is restricted to evidence acquired at the time of the complaint.[11] The Second and Sixth Circuits have allowed evidence acquired up to trial to establish probable cause.[12] The Fifth Circuit[13] in this case found it unnecessary to reach the issue "whether post-

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[11] For the proposition that post-complaint evidence is not admissible, see e.g., **United States v. $191,910.00 in United States Currency, 16 F.3d 1051, 1066-67 (9th Cir. 1994); United States v. One Lot of U. S. Currency ($36,634), 103 F.3d 1048, 1053-54 (1st Cir. 1997); United States v. Parcels of Property, 9 F.3d 1000, 1003 (1st Cir. 1993); United States v. $91,960.00, 897 F.2d 1457, 1462 (8th Cir. 1990).**

[12] For the proposition that evidence acquired up to trial could be used to show probable cause, see e.g., **United States v. $67,220.00 in United States Currency, 957 F.2d 280, 284 (6th Cir. 1992); United States v. Premises and Real Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1268 (2d Cir. 1989).**

[13] In **United States v. $87,118.00, 95 F.3d 511, 516 (7th Cir. 1996)**, the Seventh Circuit did not resolve the issue noting that it was "a matter that no doubt will be resolved in due course by the Supreme Court of the United States".

complaint evidence is admissible to establish probable cause for forfeiture" (Opinion App.) despite the fact that the bulk of the evidence presented by the Government consisted of materials obtained after the complaint was filed, including two witnesses (Dominguez and Macias) interviewed for the first time by the Government more than 18 months after the complaint was filed and disclosed to Petitioner less than five full days before the start of trial.

The better reasoned view and the position which is consistent with the statutory language is that the Government must satisfy the minimal burden of establishing probable cause with evidence in the Government's hands at the time the complaint is filed. This result is required by the rules of statutory construction.

It is well settled that forfeiture statutes are disfavored and should be applied "only when within both letter and spirit of the law". **United States v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219 (1939).** Forfeiture statutes must be strictly construed against the Government. Permitting the filing of a complaint without probable cause is inconsistent with the principle of strict construction and contrary to the spirit as well as the express requirement of the statute relied on by the Government in seeking forfeiture. As explained by the Ninth Circuit in an eloquent, well reasoned opinion:

> The plain language of the statute makes clear that the government must have probable cause at the time it institutes the forfeiture proceedings. There is nothing ambiguous about the provision at all. The statute is not cast in abstract or general terms. It requires probable cause "for the institution" of "such

> suit or action". Moreover, the statute does not say that the government must have probable cause for the maintenance of the action, or probable cause for the continuation of the action, or even probable cause for the re-institution of the action. Even more critical, the statute does not simply say that the government must have "probable cause for its action." It says the government must have probable cause for the institution of such action. The clear import of this language is that the government must show that it had probable cause to institute-that is, probable cause at the time it instituted-the suit or action in which it seeks to forfeit the claimant's property.

United States v. $191,910, 16 F.3d 1051, 1066 (9th Cir. 1994); See also, United States v. One Lot of U. S. Currency ($36,634), 103 F.3d 1048 (1st Cir. 1997); United States v. $91,960.00, 897 F.2d 1457, 1462 (8th Cir. 1990); United States v. One 1978 Piper Cherokee Aircraft, 91 F.3d 1204 (9th Cir. 1996).

The pleading requirements applicable in forfeiture cases are consistent with the conclusion probable cause must be shown as of the date on which the complaint is filed. The Supplemental Rules for Certain Admiralty and Maritime Claims require that complaints for forfeiture be verified and that they state with particularity the facts underlying the claim. Fed.R.Civ.P. C(2), E(2)(a). These rules abandon the concept of notice pleading and instead require allegations of specific facts supporting probable cause. **See United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway, 838 F.2d 1558, 1563-64 (11th Cir. 1988); United**

States v. $39,000 in Canadian Currency, 801 F.2d 1210, 1219 (10th Cir. 1986). When a government official signs the verified complaint, he must "satisfy himself that the averments in the complaint are true, based either upon his own knowledge or upon information and belief." 7A Moore's Federal Practice ¶ B.09, at B-402 (1988). Because the Government must swear that probable cause exists at the time it institutes the action, and that specific facts exist to support probable cause, it is entirely reasonable to conclude that probable cause must actually exist when the Government brings forfeiture proceedings.

Permitting forfeiture to rest on post complaint evidence would encourage governmental over reaching. "[G]overnment agents might be tempted to bring proceedings (and thereby seize property) on the basis of mere suspicion or even enmity and then engage in a fishing expedition to discover whether probable cause exists." **United States v. $191,910, 16 F.3d at 1067**[14]. Another rule

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[14] The danger to individual liberty, and indeed individual safety, of the law enforcement personnel who seek forfeiture, sharing in forfeiture proceeds, has been the subject of numerous articles.

> [T]he forfeiture laws in particular are producing self-financing, unaccountable law enforcement agencies divorced from any meaningful legislative oversight. There are numerous examples of such semi-independent agencies targeting assets with no regard for the rights, safety, or even lives of the suspects. Such dire results should prompt reform... But thus far the forfeiture industry has enjoyed an astonishing immunity from scrutiny by lawmakers and the courts.

Eric Blumenson and Eva Nilsen, "Policing For Profit: The Drug War's Hidden Economic Agenda." 65 U. Chi. L.Rev. 35 et seq. (Winter 1998) (Footnotes omitted).

> The Asset Forfeiture Fund has been the focus of intense scrutiny because the monies therein are shared between the Department of Justice, the Drug Enforcement Agency, and state and local law enforcement agencies. The unfortunate consequence of this arrangement is that prosecutors have sometimes viewed forfeiture as a convenient way to make up budgetary shortfalls.

David Cohen, "Exactly How Much Process Is Due? The Federal Courts Grapple With The Shifting Burdens of Proof in Civil In Rem Forfeiture Under 21 U.S.C. § 881(a)," 86 Ky. L. J. 711 Fn. 32 (1997-1998).

> The old thought, "power corrupts, and absolute power corrupts absolutely" is more than a truism. It is, in fact, a description of the impact of modern civil forfeiture laws on law enforcement. I think today's discussion has underlined one thing in my mind. And that is that this debate really goes to the heart of the concept of private property that we have developed in this country over two centuries. And make no mistake about it, the government is directly attacking those concepts that for more than two hundred years we have, more or less, taken for granted. The government is trying to turn that upside-down. I think that as you hear some of the cases that I'm going to discuss with you this afternoon, you will see that what grows out of civil forfeiture by its very nature, and by human nature itself, is not so much individual greed, but institutional greed. Institutional greed that is a

would encourage government attorneys to engage in delay tactics while government agents searched for some shred of evidence to support a finding of probable cause.

In this case, after filing suit, the Government delayed discovery into the existence of probable cause for almost a year on the basis of a frivolous challenge to standing. Thereafter, the Government obtained a seven month stay based on secret filings. It is not unreasonable to conclude that the Government's zealous pursuit of delay was motivated in part by its desire to bolster a weak case.

2. In a civil forfeiture action, due process requires that the owner of property sought to be forfeited be given notice of the factual basis of the Government's claims and an opportunity to prepare a defense utilizing the tools routinely available to civil litigants. A failure to disclose the identity of witnesses and the factual basis of the forfeiture action until less than five days before trial violates due process.

This Court has consistently recognized the application of the due process clause to forfeiture proceedings and upheld a person's right to notice and a hearing to contest the forfeiture of his property. The Court has held that a person whose property is subject to a forfeiture action is entitled to due process including the right to reasonable notice of the basis on which forfeiture is sought, a meaningful opportunity

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> logical result of what goes on, and the procedures that are used, in civil forfeiture. It's inevitable.

E. E. Edwards, "Governmental Abuse of Forfeiture Powers: Three Cases", 21 J. Legis 229 (1995).

to defend and fair treatment that does not indulge the government and disadvantage claimant. **United States v. James Daniel Good Real Property, 510 U.S. 43 (1993); Degen v. United States, 517 U.S. 820 (1996).**

The purpose of the due process clause is to protect an individual's "use and possession of property from arbitrary encroachment -- to minimize substantially unfair-or-mistaken deprivations of property." **James Daniel Good, Supra**. The protection afforded by the due process clause "is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding... '[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.'" Id at 54.

The Government should be held to the same standards as other litigants. Among the standards applicable to all litigants is the requirement that the litigant participate in good faith in discovery.

> Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, Plaintiff or Defendant...
>
> ...Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end; either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Hickman v. Taylor, 329 U.S. 495 (1947). In Republic National Bank of Miami v. United States, 506 U.S. 80, 92-93 (1992), this Court held that "in a civil forfeiture proceeding, where the Government has the power to confiscate private property on a showing of mere probable cause, the right to appeal is a crucial safeguard against abuse." The right to know the identity of witnesses and the factual basis of their testimony is also a crucial safeguard against abuse. Less than five days notice of the names of crucial foreign witnesses is wholly inadequate. It is impossible for Petitioner to investigate such witnesses' claims or to identify rebuttal witnesses.

In the criminal context, this Court has held that a rule requiring a defendant to give notice of alibi witnesses in advance of trial on pain of exclusion did not deprive defendant of due process. The Court reasoned:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Williams v. Florida, 399 U.S. 78, 81 (1970) [Foot note omitted].

A forfeiture action is not a poker game in which the

Government should be permitted to conceal its cards until the eve of trial. The trial in this case, however, was trial by ambush. Despite the Government's substantial pecuniary interest in the case, the Court "indulged" the Government. The Government was permitted to dictate the timing and scope of discovery with the predictable result that the Government was able to conduct substantial discovery against Petitioner within a few months of filing the complaint and Petitioner was precluded from obtaining any discovery from the Government until a month before trial. The Government was permitted to call key witnesses that had been identified to Petitioner less than five full days before trial. Further, the Government was permitted to make ex-parte filings and to obtain critical rulings -- such as a seven month stay -- on the basis of sealed materials never disclosed to Petitioner.

The one way discovery and secrecy deprived Petitioner of fair notice of the Government's case and precluded him from developing rebuttal evidence necessary to carrying his burden before the jury of negating any basis for forfeiture. Petitioner could not use the tools routinely available to litigants to challenge or narrow on opponent's case such as motions for summary judgment because Petitioner could not learn the factual basis of the Government's claim. The favoritism enjoyed by the Government was inconsistent with basic fairness and due process. Petitioner was deprived of a fair trial.

3. In a civil case in which the Government has a pecuniary interest, permitting the Government to secure witnesses by promising witnesses benefits only the Government can grant threatens the integrity of the judicial process and brings the fairness of the justice system in to question and disrepute.

This Court has long recognized that the Government should be held to the same standards of conduct that are applicable to other litigants.

> "When the government becomes the moving party and levels its great power against the citizen, it should be held to the same standards of fair dealing we prescribe for other legal contexts. To let the government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path."

Joint Antifascist Refugee Committee v. McGrath, 341 U.S. 123, 177 (1951). In civil cases between private litigants, the courts have been unwavering in their condemnation of offers or promises of benefits to witnesses in exchange for testimony as "violat[ing] the integrity of the justice system and undermin[ing] the proper administration of justice." **Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non Marine Assoc., 865 F. Supp 1516, 1526 (S D Fla. 1994).**[15] The courts have recognized that offers of payments even for truthful testimony present a danger that the witness "is induced by the promise of potential payment to give testimony he otherwise might not have given..." **Wagner v. Lehman Brothers Kuhn Leeb, Inc., 646 F. Supp 643 (N. D. Ill. 1986).**

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[15] **In re Robinson, 151 A.D. 589, 600 (1912), affirmed, 209 N.Y. 354 (1913); In re Kein, 372 N.E.2d 376, 379 (1977). See also The Florida Bar v. Jackson, 490 So.2d 935, 936 (Fla. 1986)** [attorney suspended for 18 months]; **Wagner v. Lehman Bros. Kuhn Loeb, Inc., 646 F. Supp. 643 (N.D. Ill. 1986)** [attorney disqualified for promising to remit a percentage of potential recovery in a case to induce witness to tell the truth].

In 18 U.S.C. § 201(c)(2), Congress evidenced on intent to remove the temptation inherent in a witness's accepting value from a party for his testimony. That temptation, even if unconscious, is to color or falsify one's testimony in favor of the donor. The law imposes on every witness the solemn and fundamental duty to testify truthfully, and accepting unlawful gratuities or inducements from a party compromises that solemn duty. When testimony tainted in this way is presented to the courts of the United States, judicial integrity is directly impugned. The taint occurs irrespective whether the offer is made by an attorney acting on behalf of a private party or an attorney acting on behalf of the Government.

In utilizing Macias and Dominguez, the Government sought and found individuals in difficult circumstances eager to escape from Mexico and the consequences of their long term abusive conduct. Macias responded to the solicitation of a friend, who told him "that they were looking for an individual to the things related to the airplane. That's how I knew through that friend to go speak with Mr. Santillen [U.S. Customs Agent]". (R. Vol. 209, p. 761). Government agents offered both Macias and Dominguez the possibility of relocation with their families to the United States and caused both to believe that the offer was genuine and would be carried out.

Macias explained his motive in seeking to enter the United States and his confidence that he would be able to remain:

Q. How can you legally stay in this country?

A. Because I was taken to cross and, since I told them that I was going to come over here, I wanted some kind of security for my family.

Because when I was working for the Federal Judicial Police, approximately about a month ago my fellow -- my former fellow co-workers commented to me and they were commenting among themselves that several commanders have been killed, disappeared. They are not able to find them. And that's only of the commander Grajeda group.

That's why I am here also, because I don't want what has happened to those individuals, to those companions, to happen to me. So, then I was given permission to cross over here, both to my family and to me.

Q. And do you plan to go back to Mexico?

A. I don't believe so.

Q. So, you and your wife and two kids are going to get what is called a permanent resident alien card to stay here in the United States, known as a green card; is that correct?

A. Well, I'm going to try. If they don't help me, how can I get it?

Q. Well, what agreement did you make with the American agents regarding what you wanted to receive if you would come from Mexico to the United States?

A. Safety for my family. And being in the United States, I needed papers, of course.

(R. Vol. 209, pp. 765-766).

Dominguez testified to the probability that he would be given permanent resident status and to the value of such status.

Q. Do you expect to get a green card, a permanent resident, permanent alien green card, to be issued by the government?

A. Probably, sir.

Q. For you and your wife and child; correct?

A. Probably. Yes, sir.

Q. Now, if you get that green card, then you can stay in the United States permanently, correct?

A. Yes, sir.

Q. So, that green card is a very valuable piece of paper to you; is that correct?

A. On this occasion. Yes, sir.

(R. Vol. 208, pp. 581-582).

The Government has failed to cite any authority authorizing the government to offer relocation in exchange for testimony of foreign witnesses in a civil case in which the government has a clear and direct monetary interest. In

offering relocation, the government offered a thing of value in violation of 18 U.S.C. § 201(c)(2). The illegality of the inducement to testify is a factor the Trial Court should have weighed in conjunction with the late witness disclosure. When the facts regarding Macias and Dominguez are viewed as a whole,[16] the Trial Court abused its discretion in allowing

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[16] It is doubtful that Dominguez's and Macia's entries were lawful in view of the fact that both were subject to statutory exclusion because of long term criminal conduct involving violence, extortion, torture, human rights abuses and facilitating drug trafficking. For example, Dominguez testified to subjecting people he was extorting money from to psychological and physical abuse.

> Q. What kind of pressure are you talking about placing or putting on people who would not cooperate in giving you bribe money?
>
> A. Psychological pressure, sir.
>
> Q. Would you put psychological pressure on them or would you put physical pressure on those individuals?
>
> A. On some occasions it was physical and on some occasions it was what I told you.

(R. Vol. 208, page 588, lines 18-25).

> Q. Let's talk about some of the people that you would not abuse psychologically, that you would abuse physically,

How would you abuse these individuals physically during the years '91 through '95 while you were a police officer in Juarez?

Macias and Dominguez to testify. Permitting the Government to purchase testimony prejudiced Petitioner severely.

CONCLUSION

Throughout this case, Petitioner was forced to defend against forfeiture of his property without clear notice of the claims against him. Important decisions -- such as granting a seven month stay -- were based on sealed filings never disclosed to Petitioner. The Government was allowed to hold Petitioner's property for over twenty months after filing suit while Government agents sought to find some basis for asserting probable cause.

The Government was permitted to secure witnesses by offering assistance in securing a benefit only the Government can provide. The Government has failed to identify any legal basis authorizing the Government to "pull all kinds of strings" to obtain admission into the United States in exchange for testimony in a civil case of individuals admittedly subject to numerous statutory exclusions because of their long term criminal histories of torture, extortion, drug trafficking and abuse of office. If Government officials are subject to the same rules of conduct that are commands to other litigants, it

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A. Well, beat them up. And sometimes I used the buzzer.

Q. What buzzer is that, sir?

A. Well, from that buzzer, That's what we call the buzzer, that thing we use to give electric shocks.

(R. Vol. 208, page 590, lines 2-10).

was error for the Trial Court to condone the Government's actions in hiding witnesses and buying their testimony.

The Courts must guard against the abuse of forfeiture by over zealous agents who may be tempted to seize property and then seek evidence of probable cause.

The Petition For Writ of Certiorari should be granted to resolve the split in the circuits regarding the date by which the Government must be able to establish probable cause and to make clear that in civil forfeiture proceedings, the Government is to be held to the same standards as other litigants in discovery and in securing witnesses.

Respectfully submitted,

/s/_____

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed April 28, 1997]

Civil Action No. H-95-3182

UNITED STATES OF AMERICA, *Plaintiff*,	)
v.	)
$9,041,598.68 (NINE MILLION FORTY ONE THOUSAND, FIVE HUNDRED NINETY EIGHT DOLLARS AND SIXTY EIGHT CENTS), *Defendant*.	)

FINAL JUDGMENT

In accordance with this Court's Memorandum and Order granting the United States of America's Motion for Judgment, the Defendant currency is forfeited to the Government in its entirety.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas this 25th day of April, 1997.

/s/_____
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed April 28, 1997]

Civil Action No. H-95-3182

UNITED STATES OF AMERICA, *Plaintiff*,	)
v.	)
$9,041,598.68 (NINE MILLION FORTY ONE THOUSAND, FIVE HUNDRED NINETY EIGHT DOLLARS AND SIXTY EIGHT CENTS), *Defendant*.	)

MEMORANDUM AND ORDER

This civil forfeiture case was tried to a jury during the week of March 10, 1997. The jury returned a verdict on March 15, 1997. The parties now have filed motions for judgment. *See* **Government's Motion for Judgment** [Doc. #202]; **Claimant's Motion for Judgment** [Doc. #204]; **Claimant's Motion for Entry of Judgment as Matter of Law** [Doc. #205].

For the reasons stated herein, the Government's Motion for Judgment is granted, and Claimant's motions are denied. The Defendant currency will be forfeited to the Government in its entirety.

This opinion also addresses several other issues not fully addressed or not resolved at trial.

I. MOTIONS FOR JUDGMENT

On a motion for judgment as a matter of law, a jury verdict "must be upheld unless 'there is no legally sufficient evidentiary basis for a reasonable jury to find' as the jury did." *Hiltgen v. Sumrall*, 47 F.3d 695, 699-700 (5th Cir. 1995) (quoting Fed. R. Civ. P. 50(a)(1)). Under longstanding Fifth Circuit standards,

> 'the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable jurors could not arrive at a contrary verdict, then granting a motion for judgment as a matter of law is proper.'

Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1387 (5th Cir. 1996) (quoting *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), overruled on other grounds, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.

1997). The motion should be denied if there is "substantial evidence" opposed to the motions, that is, "'evidence of such quality and weight that reasonable and fair-minded men [or women] in the exercise of impartial judgment might reach different conclusions.'" *Miller v. Butcher Distributors*, 89 F.3d 265, 268 (5th Cir. 1996) (quoting *Boeing*, 411 F.2d at 374). "'[I]t is the function of the jury as the traditional finder of facts, and not the court, to weigh conflicting evidence and inferences and to determine the credibility of witnesses.'" *Id.* (quoting *Boeing*, 411 F.2d at 375).

The jury was asked the special interrogatories and answered as follows:

> **QUESTION NO. 1**
>
> Do you find from a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was *not* the proceeds of and *not* used to facilitate drug trafficking activity?
>
> Answer "yes" or "no": No
>
> **Proceed to Question No. 2.**
>
> **QUESTION NO. 2**
>
> Do you find from a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was *not* involved in a financial transaction that was conducted or attempted to be conducted with the intent to promote the carrying on of drug trafficking activity?

Answer "yes" or "no": No

Proceed to Question No. 3.

QUESTION NO. 3

Do you find by a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was *not* transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity?

Answer "yes" or "no": Yes

Proceed to Question No. 4.

QUESTION NO. 4

Do you find by a preponderance of the evidence that any one or more of the deposits to the account at Texas Commerce Bank is/*are not* a monetary transaction in criminally derived property of a value greater than $10,000.00 in United States currency derived from drug trafficking activity?

Answer "yes" or "no": No

Proceed to Question No. 5.

If you have answered "yes" to any of the above questions, then answer Question No. 5. If you have answered "no" to all of the above questions, then do not answer Question No. 5.

QUESTION NO. 5

To the extent, and only to the extent, you have found in answer to the foregoing questions that all or part of the Defendant $9,041,598.68, if any, was:

* money used to facilitate drug trafficking activities or the proceeds of drug trafficking activities;

* a financial transaction that was conducted or attempted to be conducted with the intent to promote the carrying on of drug trafficking activity;

* money transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity; and/or,

* monetary transactions(s) in criminally derived property of a value greater than $10,000.00 in United States currency derived from drug trafficking activity,

what amount of the Defendant $9,041,598.68, if any, do you find from a preponderance of the evidence was from a source *other than* the above sources?

Answer in dollars and cents: $1,100,000.00

Verdict Form [Doc. #195].

By answering "yes" to Questions No. 1, 2 and 4, the jury stated that all of the Defendant currency came from drug-related sources. The verdict, however, could be construed to award Claimant $1,100,000.00, based on the jury's findings in answer to Questions No. 3 and 5.

Claimant argues that judgment should be entered permitting him to recover $1,100,000.00, and that any other result impermissibly ignores the jury's response to Question No. 5. Claimant urges that the jury's response to Question No. 5 is supported by the testimony of Dr. Ruiz Quintanilla that he received $1,100,000.00 in cash from the sale of real estate in Mexico and gave the funds to his son, Jose Francisco Ruiz Massieu, to care for. Dr. Ruiz Quintanilla further explained that years later, after he gave permission, Jose Francisco transferred the money to Claimant.[1] Claimant takes the position that Questions Nos. 1 through 4 were confusing, while Question No. 5 was clear, and that no basis exists to disregard the jury's response to Question No. 5. Claimant asks the Court to disregard the jury's answers to Questions No. 1, 2 and 4.

Claimant timely objected to the double negatives in the jury interrogatories, arguing that they would confuse the jury,

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[1] Claimant also testified to these matters.

and requested that the jury be asked only two questions.[2] The Court denied Claimant's requested charge because Claimant's expressed theory at trial was that the Government had failed to meet its burden on its four legal theories for forfeiture. Claimant disavowed any intent to rely on the "innocent owner" defense or any other statutorily mandated defense theory. *See* 18 U.S.C. § 981(a)(2); 21 U.S.C. § 881(a)(6).

The Fifth Circuit has held that, once the Government makes its showing of probable cause to believe that a substantial connection exists between the property sought to be forfeited and the illegal activity, the burden shifts to the

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[2] Claimant requested the following interrogatories:

Requested Jury Issue No. 1
Do you find from a preponderance of the evidence that all or part of the $9,041,598.68 from Account No. 80100355370 were from a source other than the following:

[Identify specific statutory elements of statutory basis on which Court find [sic] probable cause, if any].

Answer "Yes" or "No."

ANSWER: _____

Requested Jury Issue No. 2
What amount of the $9,041,598.68, if any, do you find from a preponderance of the evidence were from a source other than the following:

[Identify specific statutory elements of statutory basis on which Court find [sic] probable cause, if any].

Answer in dollar [sic] and cents.

ANSWER: $_____

Claimant's Supplemental Requested Jury Issues [Doc. # 198].

claimant to demonstrate by a preponderance of the evidence "that factual predicates for forfeiture have not been met *or* that a defense to the forfeiture applies." *United States v. 1988 Oldsmobile Supreme*, 983 F.2d 670, 674 (5th Cir. 1993) (footnotes omitted) (emphasis added) (citing *United States v. $364,960.00 in United States Currency*, 661 F.2d 319, 325 (5th Cir. 1981); *United States v. LITTLE AL*, 712 F.2d 133, 137 (5th Cir. 1983)); *United States v. Land, Property Recorded in Name of Neff*, 960 F.2d 561, 563 (5th Cir. 1992). *See* Court's Memorandum and Order Regarding Bifurcation [Doc. # 172]. It thus appears that a claimant may prevail if he convinces the jury the Government has not proven its own theories of the case; a claimant need not necessarily establish an affirmative defense to forfeiture in order to prevail at trial. The Court therefore posed to the jury one question for each of the Government's theories, rather than Claimant's one proposed interrogatory, in order to determine whether or not Claimant had met his burden of proof on any or all of the Government's theories.[3] The final jury question was to allow the jury to determine the amount of Claimant's recovery, if any. This question was predicated on a favorable finding for Claimant on one or more of the Government's theories.

Civil forfeiture law generally, and jury instructions in

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[3] The Government requested and the Court delivered the jury questions based on the relevant statutes: 21 U.S.C. § 881(a)(6) (Question No. 1); 18 U.S.C. § 981(a)(1)(A) with 18 U.S.C. § 1956(a)(1)(A) (Question No. 2); 18 U.S.C. § 981(a)(1)(A) with 18 U.S.C. § 1956(a)(2)(A) (Question No. 3); and 18 U.S.C. § 981(a)(1)(A) with 18 U.S.C. § 1957(a) (Question No. 4).

civil forfeiture cases in particular, are not well developed.[4] In an exercise of caution, the Court adopted language from the Fifth Circuit case law on which Claimant's strategy seemed to rest, which defines the Claimant's burden as proof of a negative. *See 1988 Oldsmobile Supreme*, 983 F.2d at 674 (claimant must prove that factual predicates for forfeiture have *not* been met); *Neff*, 960 F.2d at 563 (claimant has burden to establish by a preponderance of the evidence that the property was *not* used for illegal activity). As a courtesy to the parties, and in recognition that the jury interrogatories could be confusing, the Court supplied the parties with a copy of the "Court's Instructions to the Jury" and the Verdict Form prior to counsel's closing arguments. Both the Government and Claimant argued directly from the Verdict Form during

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[4] There is no guidance from the Fifth Circuit (or any other appellate court) as to how to instruct a jury, or to frame the jury interrogatories, given the shifting burden of proof in the forfeiture statutes. Although Claimant carries the burden of proof once the Government has made a probable cause showing, it is awkward in a jury trial for Claimant to be required to prove a negative, *i.e.*, that the Defendant currency had no involvement in specified unlawful activities.

Since Claimant did not pursue an innocent ownership defense, but rather attacked the Government's proof under each of its theories, *see 1988 Oldsmobile Supreme*, 983 F.2d at 674, the Court framed the issues in the jury's interrogatories to reflect the elements in the forfeiture and drug statutes identified in the Government's complaint. It is unclear whether, particularly in cases in which a recognized statutory defense is *not* asserted by a claimant, the jury interrogatories should reflect the claimant's non-statutory argument as set forth in its claim, or whether the questions should track the Government's complaint, which sets forth specific legal theories under the applicable statutes.

their closing arguments, telling the jury whether they desired a "yes" or "no" response to each question.

The Court agrees with Claimant that the jury's response to Question No. 5 may not be disregarded. *Hiltgen*, 47 F.3d at 699-700. Nevertheless, in order to give proper effect to all of the jury's responses, the response to Question No. 5 must be read in conjunction with the other responses and with the predicate instruction. The predicate instruction to Question No. 5 stated that the jury was not to answer Question No. 5 unless it had answered "yes" to any of the previous questions. Therefore, the jury's answer to Question No. 5 must be read as an explanation of its answer to Question No. 3 — the only question to which the jury had answered "yes". Specifically, the response to Question No. 5 indicates that Claimant proved to the jury's satisfaction that $1,100,000.00 was not money "transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity," as referenced in Question No. 3.

The superficial inconsistency of the jury's answers to Questions No. 3 and 5 with the responses to Questions No. 1, 2 and 4 is reconciled if the answers to Questions No. 3 and 5 are interpreted to mean that the jury was persuaded by Claimant that the Government's proof was insufficient as to the movement of $1,100,000.00 of the Defendant currency *from the United States* to or through Mexico, as asked in Question No. 3. Question No. 3 is the only jury question that contained a geographic element, namely, a requirement of proof that the funds were transported from somewhere inside the United States to Mexico, in addition to an element relating to drug trafficking. The testimony offered by Claimant and

his witnesses as to the $1,100,000.00 transferred by Dr. Ruiz Quintanilla to his son likely explains the jury's answer to Question No. 5, since the evidence supports a jury finding that the relationship of the $1,100,000.00 to the United States had not been demonstrated adequately. However, the response to Question No. 3 does not indicate that the jury believed that the $1,100,00.00 was not drug-related.

In context, the answer of $1,100,00.00 to Question No. 5 is academic. Even though the Claimant convinced the jury that the $1,100,00.00 was not the result of the activity identified in Question No. 3, Claimant failed to prove that the $1,100,00.00 was not the result of the activity identified in Questions No. 1, 2 and 4. Stated another way, through its responses to Questions No. 1, 2 and 4 the jury stated *three times* that *all* of the Defendant currency was drug-related.[5]

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[5] Both Questions No. 1 and 2 asked the jury whether the Defendant currency, "in whole *or in part*," was *not* involved in drug trafficking activity. Therefore, if the jury had believed that $1,100,00.00 was wholly unrelated to drug activity, rather than only that it was not shown to have moved from the United States to Mexico as asked in Question No. 3, it could and should have answered "yes" to both Question No. 1 and Question No. 2. Indeed, this is the response Claimant's counsel advocated during closing arguments. Moreover, Question No. 4 asked whether "*any one or more* of the deposits" to the Houston bank account were monetary transactions in criminally derived property. Again, if the jury had believed that $1,100,00.00 was family money with no connection to drug activity, it could and should have answered "yes" to this question. The jury's answer to Question No. 5 then would have resulted in Claimant's recovery of the $1,100,00.00. The jury's "no" responses to all of these questions clearly indicate that it considered all of the Defendant currency and therefore all of

Since the jury found that the Claimant failed to prove that the Defendant currency did not come from the drug-related sources identified in Questions No. 1, 2 and 4,[6] Claimant failed to overcome the Government's forfeiture proof as to any the funds under the theories forming the basis for those questions.

In sum, the United States claimed the right to forfeit the Defendant currency under four separate theories. Claimant's approach to the case was to attack the Government's proof as to each of these theories. The Court must read the verdict as the jury's decision that the Government prevailed on three of its four theories. Because Claimant failed to defeat the Government's proof on three theories, and this Court found the requisite probable cause existed, the Government is entitled to forfeit the Defendant currency in its entirety. In this way, the Court gives effect to all of the jury's responses. Since a "legally sufficient evidentiary basis" exists for a reasonable jury to find as this jury did, the verdict is upheld, Fed. R. Civ. P.50(a)(1); *Hiltgen*, 47 F.3d at 699-700, and judgment will be entered in favor of the United States as to the entire amount of the Defendant currency.[7]

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the bank deposits to have been the product of drug trafficking activity.

[6] The Court notes that the sources identified in Questions No. 1, 2 and 4 are not mutually exclusive, and thus there is no inconsistency in a statement from the jury that the Defendant currency, in its entirety, came from each of the specified sources.

[7] Interest on the forfeited funds is addressed *infra* at 22.

II. OTHER UNRESOLVED LEGAL ISSUES

A. Sufficiency of Claimant's Ownership of Possessory Interest, as Related to Standing

This Court held early in the litigation of this action, based upon the relevant authorities and the record as it existed at the time, that Claimant had standing to contest the forfeiture of the Defendant currency. The Court's opinions explicitly recognized the light burden placed upon Claimant at the preliminary stage of the case,[8] and expressed doubt as to what legally cognizable "ownership" or "possessory"

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[8] *See* Memorandum and Order Regarding Standing, dated March 31, 1996 [Doc. #54]; Memorandum and Order on Reconsideration of Standing, dated May 22, 1996 [Doc. #75]. In order to establish standing, Claimant merely was required to demonstrate a "facially colorable" interest in the proceedings, and was not required to prove the merits of his underlying claim. *U.S. v. $38,570 in U.S. Currency*, 950 F.2d 1108, 1112 (5th Cir. 1992). Indeed, while a "bare assertion of ownership" of the currency, without more, is insufficient to confer standing, "some evidence" of an ownership interest is sufficient. *Id.* at 1112-13. One district court has stated that the demand "that claimants show a legitimate source for the purpose of establishing standing improperly accelerates the claimant's ultimate burden," since it is proper that the government "first demonstrate probable clause sufficient to shift the burden to the claimant." *U.S. v. $80,760.00 in U.S. Currency*, 781 F.Supp. 462, 467 n.15 (N.D. Tex. 1991) (internal quotations and citations omitted), *aff'd*, 978 F.2d 709 (5th Cir. 1992). As this Court noted earlier in this case, courts generally look to dominion and control, such as possession, title, financial stake, as evidence of an ownership interest. *$38,570,950* F.2d at 1113.

interest Claimant had.[9] The Court did not require Claimant to define his interest according to Texas law, such as gift, bailment, or trust, since appellate courts have not required a claimant to satisfy such a detailed or stringent burden of proof at the early stages of litigation.[10]

However, because of ambiguities in the procedures courts have set forth for forfeiture cases, Claimant's standing to recover some or all of the Defendant currency to date has not been definitively resolved. Although the issue now may be rendered moot by the foregoing judgment on the verdict, to be entered as a matter of law, Claimant has repeatedly declared his intention to appeal. If Claimant is successful in his challenge to certain of this Court's rulings, the legal sufficiency of Claimant's interest in the Defendant currency, *i.e.*, his standing to contest the forfeiture, would become a live issue once again.

The Court therefore deems it necessary and appropriate for the sake of judicial economy to determine

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[9] The Court characterized Claimant's demonstrated interest as "unusual" and, after having recited the definition of bailment, stated, "Although some facts of this case seem to reflect a classic bailment relationship, rather than outright ownership, the standing inquiry is necessarily superficial and Massieu has met his initial burden." Memorandum and Order on Reconsideration of Standing [Doc. #75], at 4-5.

[10] Nevertheless, the Court fails to understand why, at the standing stage in this case, Claimant could not have provided affidavits from his family members to support his theory of ownership.

whether Claimant has a recognized legal or equitable interest in all or part of the Defendant currency, which interest would entitle him to recover the currency if he were to prevail as a result of the jury verdict. Standing is "'literally a threshold question for entry into federal court.'" *$38,570*, 950 F.2d at 1111 (quoting *United States v. $321,570 in U.S. Currency*, 874 F.2d 298, 302 (5th Cir. 1989)). Since standing limits the court's exercise of its jurisdiction, "the court must consider the standing of any party even if the issue has not been raised by the parties to the action." *United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370, 1374 (5th Cir. 1986), *opinion on denial of rehearing*, 802 F.2d 837 (5th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). The issue of standing is one of law. *$38,570*, 950 F.2d at 1111.[11]

The Court recognizes that it is unorthodox to address the threshold issue of standing after having upheld a jury's verdict. However, Claimant had satisfied the low burden of proof for standing that Fifth Circuit authority requires this Court to impose pretrial. It was only during trial, after the Government satisfied its probable cause burden and the burden of proof shifted to Claimant, that Claimant could be held to the more demanding standard of a preponderance of the evidence.

Claimant has argued consistently at all stages of this case that he has standing by virtue of ownership by gift. The

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[11] Neither party explicitly addressed at trial Claimant's specific ownership interest *or* the standing issue. However, the Government's summary judgment motion and its earlier motions to dismiss Claimant's claim for lack of standing properly preserved the issue. *See* Docs. #5, 56, 107.

Court finds and concludes on the basis of the entire record that, since summary judgment was granted in favor of the Government on the issue of gift and Claimant never articulated any other recognizable property interest in the Defendant currency, Claimant lacks standing to contest the forfeiture and to recover any portion of the currency.[12]

Shortly prior to trial, the Government moved for summary judgment, arguing that the facts of record did not support "ownership by gift," which appeared to be the only legal basis for Claimant's interest in the Defendant currency. The Court granted summary judgment in favor of the Government, holding that Claimant had failed to establish a genuine question of fact that he could meet the test for ownership by gift as to the Defendant currency. *See* Memorandum and Order Granting Partial Summary Judgment [Doc. # 117]; Memorandum and Order Denying Reconsideration [Doc. # 170]. These opinions dealt narrowly with the elements of gift; the rulings did not decide the broader and more general issue of defining precisely Claimant's ownership or interest in the Defendant property, because the issues were not fully addressed by the parties.

Immediately prior to trial, Claimant explicitly

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[12] Even if Claimant had been permitted to present his proof on this issue of ownership by gift at trial, such proof would be identical to the evidence actually introduced by Claimant at trial. Indeed, Claimant acknowledged such at conferences during trial, outside of the jury's presence, when the Court raised the possibility of allowing Claimant to present evidence going to ownership by gift despite the fact that the Government had prevailed on the issue on summary judgment.

abandoned any bailment theory. *See* Claimant's Memorandum on Classification of Mario Ruiz Massieu's Interest in Funds [Doc. #180]. At trial, Claimant did not develop the ownership issue, apparently because he chose not to pursue an "innocent owner" defense. Claimant did not argue or supply legal authority for any specific interest in property recognized under Texas law. Instead, he adhered to his argument that he was entitled to the Defendant currency because he had possession of it for his own use and on behalf of his family, and since he had placed the funds in a bank account over which he had exclusive control. The Court notes that no formal claim by Claimant's family is on file.

Despite Claimant's efforts at trial to defeat the forfeiture by establishing alternative sources and explanations for the Defendant currency, Claimant's evidence at trial supported and reinforced the Court's summary judgment opinion. The Court again concludes, as a matter of law, that Claimant failed demonstrate a genuine issue of material fact that the Defendant currency was comprised of "gifts" to Claimant under Texas law. To the extent necessary, the Court further holds that Claimant failed at trial to prove ownership by gift, or any other recognizable property interest, by a preponderance of the evidence.

As found by the jury in its answers to the special interrogatories, Claimant failed at trial to prove that the Defendant currency is not drug related. In addition, the weight of Claimant's *own* evidence at trial does not support Claimant's "gift" theory; rather, it establishes nothing more than that, in the eyes of Claimant and his father, the Defendant currency was "family money." Claimant's father, Dr. Ruiz Quintanilla, testified that the family had accumulated

money which was in the custody of Jose Francisco Ruiz Massieu, but that Jose Francisco had, in 1994, asked for his father's authority and consent to transfer to money to Claimant, and that Dr. Ruiz Quintanilla had consented. Dr. Ruiz Quintanilla also testified that the money was accumulated by the entire family so as to prepare for the possibility that the family would have to leave Mexico, and that Claimant had a moral responsibility to use the money to help his family members. Similarly, Claimant testified that his brother Jose Francisco Ruiz Massieu originally had taken custody of the "family fund" because he had been a person who had helped all other members of the family and was the most sophisticated in financial matters. Claimant further testified regarding family conversations as to the amount of money each member could or did contribute to the fund, and echoed his father's testimony that the fund had been created to prepare for the possibility that the entire family would need to relocate.[13]

The testimony of Dr. Ruiz Quintanilla and Claimant

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[13] Claimant introduced some evidence that an unspecified sum (which he estimated to have been hundreds of thousands of dollars) of the Defendant currency were "bonuses" to him that he saved from his tenures as ambassador to Denmark or as a Deputy Attorney General in Mexico. Claimant, however, provided no probative documentary evidence for his receipt of such large sums or for the dates of such payments. The Court finds that Claimant's evidence is unsubstantiated and not credible. Even if Claimant's evidence were deemed sufficient to create genuine question of fact, the evidence is overwhelmingly outweighed by contrary evidence in the record indicating the funds were payments to facilitate drug trafficking or proceeds of payments involving such activities.

that Jose Francisco Ruiz Massieu and later Claimant had "complete authority" over the money indicates to the Court merely that Jose Francisco Ruiz Massieu, and then Claimant, had day-to-day control over the funds.

While the outer limits of standing under the forfeiture statutes still await appellate court definition, the broad "ownership" interest defined in the federal case law as any person with a "recognizable legal or equitable interest in the property seized," must be interpreted in light of state law delineating legally recognized ownership or possessory interests. *See* Memorandum and Order Granting Partial Summary Judgment [Doc. #117], at 8-9 & nn. 3-4 (discussing interplay between federal and state standards); *$38,570*, 950 F.2d at 1111-12 & n.4; *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 805 n.8 (3d Cir. 1994). *See also United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 1000 (5th Cir. 1990) (regarding innocent owner defense, "interest should be established by referring to Texas law, and the court should protect that interest to the extent that Texas law does not contravene the federal forfeiture scheme").[14]

It is Claimant's burden to demonstrate his claim to the Defendant currency satisfies this standard. *$38,570*, 950 F.2d at 1111. The Court, in accordance with the relevant authority on standing, did not require detailed proof and pleading as to Claimant's standing prior to trial. *See id.* at 1112 (a claimant

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[14] Both sides argued in the initial round of summary judgment briefing that Texas law applied. *See* Docs. #107, 109. Claimant's briefing on his motion for reconsideration asserted that Mexican law applied, *see* Doc. #126, but no competent expert opinion evidence was introduced at trial on this matter.

need not prove the merit of his underlying claim to establish standing, but must show a facially colorable interest); *U.S. v. $80,760.00 in U.S. Currency*, 781 F.Supp.462, 467 n.15 (N.D. Tex. 1991), *aff'd*, 978 F.2d 709 (5th Cir. 1992) (claimant's ultimate burden would be improperly accelerated if court were to demand, before the government makes its probable cause showing sufficient to shift burden to claimant, that claimant show a legitimate source of currency for the purpose of establishing standing).[15] Now that this case has been tried, however, and the Government has made its probable cause showing and Claimant has had the opportunity to present all of his evidence to a jury, the considerations afforded to claimants at early stages of forfeiture litigation are neither necessary nor justified.

All the credible evidence of record requires the conclusion that Claimant did not receive an unconditional transfer of the funds, as is required for ownership by gift under Texas law. Claimant never articulated any other

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[15] Moreover, during the pretrial stages of this case Claimant was responding to repeated extradition proceedings. He complained that documents were unavailable to him since he was not given access to his home in Mexico. Claimant further complained that discovery of the Government's witnesses and documents was precluded for security reasons and on the grounds that a pending investigation was underway. However, these excuses are no longer probative. Claimant's sources of proof of ownership were largely his family and other third party records, which evidence was presented shortly before or during trial. In addition, Claimant repeatedly sought a prompt trial date, thus indicating that he was prepared to prove his claim despite certain logistical difficulties.

recognizable property interest in the Defendant currency. Since Claimant has failed to establish a particular "recognizable legal or equitable interest" under state or federal law, *see supra* at 15, he has failed to demonstrate that he has standing to recover any of Defendant currency.[16]

B. Probable Cause

Claimant has moved for entry of judgment as a matter of law on the basis that the Government failed to establish the existence of probable cause as of June 15, 1995, and therefore that the *seizure* of Defendant's currency on March 13, 1995, was improper. *See* Claimant's Motion for Entry of Judgment as a Matter of Law [Doc. #205]. As noted in a previous opinion, Memorandum and Order [Doc. #184], at 2 and n.1, justification of probable cause for seizure of the defendant property in an *in rem* proceeding must be distinguished from justification of probable cause for forfeiture. At least one leading commentator has noted that lack of probable cause for seizure only results in suppression of evidence, and has "no other bearing on the probable cause question under [19 U.S.C.] section 1615." 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 11.03[6], at 11-28 n.51 (1996) (citing *United States v. Monkey*, 725 F.2d 1007, 1011-12 (5th Cir. 1984)).

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[16] *See United States v. $511,780.00 in United States Currency*, 847 F.Supp. 908 (M.D. Ala. 1994) (deciding standing issue at conclusion of bench trial.) *Cf. United States v. One 6.5 MM Mannlicher-Carcano Military Rifle*, 406 F.2d 1170, 1172 (5th Cir. 1969) (stating in *dicta* that "an adjudication of ownership would be in order where the property was to be returned to the claimant").

In *United States v. Monkey*, the Fifth Circuit held that evidence obtained in an unlawful seizure is inadmissible. Since the Government in the case at bar did not seek to use evidence obtained from the seizure, namely, the Defendant currency itself, it was unnecessary for the Court to resolve the issue of the validity of the seizure *per se*.[17] Claimant's motion for judgment is denied.

Moreover, to the extent that Claimant is requesting judgment as a matter of law that the Government did not have probable cause for the *forfeiture* as of June 15, 1995, the motion also is denied. The Court's basis for finding probable cause as of June 15, 1995 was delivered in detail on the record in open court on March 15, 1997.

C. Admissibility of Co-Conspirator Statements

The Court held during the course of the trial that various statements by the Government's witnesses are admissible as co-conspirators' statements, pursuant to Federal

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[17] There is a further open issue: when and how should a seizure for forfeiture be challenged? Claimant filed an action at the time of the seizure and was pursuing an appeal of the district court's granting the pre-suit order of seizure. When the Government commenced this forfeiture case, Claimant abandoned his appeal. Although Claimant initially raised the seizure issue, the issue became moot when the Government did not rely upon any of the seized evidence for its probable cause showing *Cf. Monkey*, 725 F.2d at 1012.

Rule of Evidence 801(d)(2)(E).[18] The Court made findings on several occasions at the sidebar when Claimant lodged objections to the testimony. For the sake of completeness and to summarize the Court's reasoning in one place, the Court makes the following findings and conclusions.

For a statement to be admissible as a co-conspirator statement, the Court must find that:

1. there was a conspiracy in existence;

2. the declarant was a member of that conspiracy;

3. the defendant against whom the statement is offered was a member of that conspiracy;

4. the statement was made in furtherance of that conspiracy; and

5. the statement was made during the course of that conspiracy.

United States v. Asibor, No. 96-60031, 1997 WL 138910, *6 (5th Cir., Mar. 27, 1997); *United States v. Broussard*, 80 F.3d 1025, 1038 (5th Cir.), *cert. denied*, 117 S. Ct. 264 (1996); *United States v. Jensen*, 41 F.3d 946, 960 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1835 (1995); *United States v. Ruiz*,

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[18] "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

987 F.2d 243, 247 (5th Cir.), *cert. denied*, 510 U.S. 855 (1993). The Court may take into consideration the content of an alleged co-conspirator's statement itself in determining whether that statement is to be admitted as a co-conspirator statement. *Bourjaily v. United States*, 483 U.S. 171, 181 (1987); *Broussard*, 80 F.3d at 1039. The Court must make a determination as to whether the Government has proven by a preponderance of the evidence the elements listed above. *Broussard*, 80 F.3d at 1038.

To use the co-conspirator exception to the hearsay rule, there does not need to be an indictment charging a conspiracy. *United States v. Layton*, 855 F.2d 1388, 1398 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *United States v. Kendall*, 665 F.2d 126, 131 & n.6 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The statement must have been made by a member of the conspiracy at the time of the statement, but the declarant need not be a named defendant in the indictment, *Asibor*, 1997 WL 138910, at *6, or presumably, in the pleading asserting the existence of the conspiracy.

The Claimant primarily objected to testimony by three Government witnesses: Tony Ortiz, who was a self-described cocaine trafficker within the Juan Garcia Abrego narcotics cartel, and Raul Macias and Cesar Domingquez Becerra, who were former actual or "pseudo" officers in the Mexican law enforcement hierarchy. The potentially objectionable statements consisted of Ortiz's, Macias's and Domingez's repetition of various comments by others concerning the source and destination of cargo the witnesses stated was cocaine or cash that had resulted from the sale of cocaine. Claimant contended that these statements were hearsay and

thus not admissible.

The Court found at trial and again finds that these statements were admissible under the co-conspirator exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E). The Government established by a preponderance of the credible evidence all of the elements necessary to the admissibility of the contested statements:

1. A Conspiracy Existed — The Court finds that Government proved by a preponderance of the credible evidence that during the period starting no later than 1990 through at least 1994, a conspiracy existed to distribute and to sell cocaine and marijuana in the United States by transporting the narcotics through Mexico and receiving payment for the sales in Mexico. Co-conspirators included certain officials within the PGR, including but not limited to Claimant Massieu, his subordinates (including Stergios and Adrian Carrera Fuentes), Roberto Loyo (who allegedly carried money to Claimant Massieu), various other named and unnamed officials working within the Mexican Federal Judicial Police (MFJP) with authority for investigating violations of and enforcing Mexico's narcotics laws, and other individuals with local law enforcement responsibilities. Co-conspirators also included various narcotics traffickers, including Juan Garcia Abrego, Adriano Felix, Amado Carrillo Fuentes, and individuals who worked for them. While the identities of many of the co-conspirators was not established by the Government, unrebutted testimony at trial established that numerous officials, from the local police up through the highest ranks of the MFJP, including the Deputy Attorney General, received payments of cash in exchange for allowing the traffickers to transport narcotics during specified periods.

The evidence established that the narcotics traffickers used cash obtained from the sale of narcotics in the United States to pay these officials.[19]

2. Declarant Was a Member of the Conspiracy — The Court finds that each Ortiz, Dominguez and Macias were members of the conspiracy alleged and proven by the Government.

3. Person Against Whom the Statements Are Offered Was a Member of the Conspiracy — The Court finds further that, during the times that Claimant Massieu served in the position as Deputy Attorney General or in comparable positions, he was a member of the conspiracy. The fact that Claimant did not occupy the office of Deputy Attorney General during 1990-92 and parts of 1993 and 1994 does not change the Court's conclusions as to admissibility of the witnesses' testimony. Once a person joins a conspiracy, evidence about the conspiracy prior to the person's joining the conspiracy is admissible against that person. *United States v. Barksdale-Contreras*, 972 F.2d 111, 114 (5th Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993). Moreover, there is no evidence that Claimant ever withdrew from the conspiracy.

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[19] The Court relies for these findings upon the testimony by witnesses including Ortiz, Dominguez and Macias, as well as that of United States Customs Service Robert Rutt and the affidavit of Adrian Carrera Fuentes, a former Mexican MFJP official. In addition the testimony of United States Customs Inspectors and supervisors, Scott Menger, Debra Zezima, and Vincent Iglio, corroborated this result. The small denominations of the bills comprising the $9 million deposited at Texas Commerce Bank at the direction of Claimant also corroborates this conclusion.

4. The Statements Were Made in Furtherance of and During the Course of the Conspiracy — Each of the statements admitted into evidence were made in furtherance and in the course of a wide-ranging conspiracy, described above, in that they pertained to movement of drugs through Mexico and associated bribery of Mexican officials for the purpose of inducing those officials not to prosecute or enforce Mexican anti-drug laws against the drug cartel's couriers and traffickers.

The Court therefore concludes that the Government established that the statement included in the testimony of Ortiz, Dominguez and Macias, as well as in the affidavit of Carrera Fuentes — *i.e.*, statements about payments by narcotics traffickers, transportation of cocaine and marijuana through Mexico to the United States, the transportation of cash from the United States into Mexico, and the willingness of the MFJP officials (as well as local officials and their henchmen) to permit, participate in, or at least not prosecute such activities — meet the co-conspirator exception to hearsay in Rule 801(d)(2)(E), and therefore were admissible in evidence at trial.

D. Interests and Costs

The Government is entitled to recover the interest on the Defendant currency, if any, since it is property or proceeds "traceable" to the drug trafficking activity found by the jury. *See* 18 U.S.C. § 981(a)(1)(A); 21 U.S.C. § 881(a)(6). All right, title and interest in the property vested in the United States upon commission of the act giving rise to the forfeiture. 18 U.S.C. § 981(f); 21 U.S.C. § 881(h). *See Monkey*, 725 F.2d at 1012.

As for costs, Rule 54(d) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."[20] Fed. R. Civ. P. 54(d); *Corpus Christi Oil and Gas v. Zapata Gulf Marine*, 71 F.3d 198, 205 n.5 (5th Cir. 1995). This provision "creates 'a strong presumption that the prevailing party will be awarded costs.'" *U.S. v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 539 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988) (quoting *Schwarz v. Folloder*, 767 F.2d 125, 131 (5th Cir. 1985)). The Court has discretion to decline to award costs to a prevailing party, if the Court gives reasons for refusing to permit the award. *Id; Schwarz*, 767 F.2d at 131.

In this case, the Court exercises its discretion to deny costs to the Government. The Court anticipates that the majority of the Government's costs of court are attributable to the numerous expedited depositions which took place in the weeks immediately before trial.[21] Transcription of these depositions had to be expedited because of the Government's

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[20] Rule 54(d) does not apply to cases in which an express provision for costs is "made either in a statute of the United States or in these rules." Neither party has cited the Court to any other provision applicable to costs in this case. *Cf.* 28 U.S.C. § 2465 ("Upon the entry of judgment *for the claimant* in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs . . .") (emphasis added).

[21] No itemized bill of costs has been filed.

request, granted by the Court, that discovery of Government witnesses be stayed pending further related investigations by the Government and then completion of the Juan Garcia Abrego criminal trial. Claimant has consistently maintained that the stay was unnecessary. Moreover, it is likely that Claimant already has borne substantial cost as a result of the stay, since many of the expedited depositions, for which daily copy had to be ordered, were of the Government's confidential informants. Finally, as a result of the jury's verdict, Claimant, a person living outside his native country with no identified current source of income, will not recover any of the Defendant currency that he caused to be brought to the United States. Therefore, the Court deems it inappropriate and inequitable to require Claimant to pay court costs to the United States Government.

For the foregoing reasons, it is hereby

ORDERED that the **Government's Motion for Judgment** [Doc. #202] is **GRANTED**. It is further

ORDERED that **Claimant's Motion for Judgment** [Doc. #204] and **Claimant's Motion for Entry of Judgment as Matter of Law** [Doc. #205] are **DENIED**. It is further

ORDERED that the Government is entitled to the interest, if any, on the Defendant currency. It is further

ORDERED that each party is to bear its own costs.

SIGNED at Houston, Texas, this 25th day of April, 1997.

/s/_____
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed December 15, 1998]

No. 97-20413

Appeal from the United States District Court
for the Southern District of Texas

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
$9,041,598.68 (NINE MILLION FORTY ONE THOUSAND, FIVE HUNDRED NINETY EIGHT DOLLARS AND SIXTY EIGHT CENTS), *Defendant*,	)
MARIO RUIZ MASSIEU, *Claimant-Appellant*.	)

OPINION

Before JOLLY, BARKSDALE, and BENAVIDES, Circuit Judges.

OPINION BY: BENAVIDES, Circuit Judge:

This is an appeal from a judgment of forfeiture, pursuant to 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981, of $9,041,598.68 in United States currency. Appellant, Mario Ruiz Massieu ("Massieu"), contends that he is the owner of the forfeited funds and that the district court erred in (1) entering judgment in favor of the Government as to the entire amount of the defendant currency, (2) finding post-verdict that he had no standing to contest the forfeiture, and (3) determining that the Government established probable cause for the forfeiture. Additionally, he argues that the cumulative effect of the district court's discovery and procedural rulings--e.g., denial of Massieu's request for an unredacted copy of the seizure affidavit (in order to seek suppression), ex parte examination of materials presented in support of Government's application for stay, failure to exclude testimony of last-minute Government witnesses, and failure to bifurcate the trial--deprived him of due process. For the reasons set forth below, we AFFIRM the district court's April 25, 1997 order for forfeiture.

I. PROCEDURAL BACKGROUND

On March 13, 1995, United States Magistrate Judge Frances Stacy, acting pursuant to a sealed affidavit, issued a warrant for the seizure of $ 9,041,598.68 in U.S. currency from an account at Texas Commerce Bank (TCB). Approximately three months later, on June 15, 1995, the United States filed a complaint for forfeiture in rem against the seized currency. The complaint alleged that the money constituted narcotics trafficking proceeds given to facilitate the movement of drugs into the United States. At the time the

complaint was filed, Massieu, a former Deputy Attorney General for the Republic of Mexico, was in federal custody in New Jersey.[1]

On June 26, 1995, Massieu filed a Notice of Claim. He served the United States with 18 multi-part interrogatories and a request to produce 52 categories of documents.[2] He followed this on July 6, 1995 with his answer denying the factual recitations in the United States' complaint and a motion to dismiss for failure to state a claim. He also moved for a protective order to relieve him of the duty to respond to the United States' interrogatories, which was denied on July 28, 1995. Massieu alleged ownership of the seized currency, claiming that he had received the money from his brother.

On July 28, 1995, the United States moved for a protective order and to quash the interrogatories served by Massieu. United States District Judge Nancy Atlas granted both motions on November 6, 1995. On the same day, the Government requested that it be permitted to take Massieu's deposition to determine his claim of ownership. Judge Atlas ordered the deposition to occur forthwith.

On March 31, 1996, the district court found that Massieu had standing and granted his February 20, 1996, motion to expedite. The court further addressed his motion to

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[1] Massieu had been arrested in Newark on March 3, 1995, for violating 31 U.S.C. § 5316 by failing to declare that he was carrying currency in excess of $ 10,000.

[2] The Government, in comparison, served Massieu with nine interrogatories with the complaint.

reconsider a January 11, 1996, order that sealed a United States' affidavit which had acquainted the court with informant information. The court found that the interests of the United States in ongoing criminal investigations continued to justify the *ex parte* filing of the sealed affidavit.

On April 12, 1996, the Government moved the district court pursuant to 21 U.S.C. § 881(i) to stay civil discovery pending the criminal trial of narcotics trafficker Juan Garcia Abrego in United States v. Abrego. At the May 31, hearing on the stay, Massieu's counsel requested copies of the sealed affidavits that had formed the basis for the stay. Judge Atlas denied the request and granted the United States' motion to stay.

The Abrego prosecution was completed in October 1996. Massieu moved on November 18, 1996, to vacate the stay, to unseal documents, for an expedited pretrial conference, and for a speedy trial. The court vacated its stay on December 11, 1996, granted the request for a speedy trial, and set the case for trial on March 10, 1997. The court further advised the parties that discovery disputes would be resolved promptly.

The Government filed its amended complaint on December 16, 1996, and one week later apprised the district court that it had answered Massieu's interrogatories and produced over 350 documents. The Government also supplemented its production with additional documents in January 1997.

In a hearing on January 31, 1997, Judge Atlas ordered the Government to list its witnesses and to provide detailed

witness information to Massieu. The Government provided Massieu with a witness list on February 9, 1997. The next day, on February 10, 1997, the district court ordered that depositions of the Government's witnesses begin on February 11, 1997, with the Government making a rolling production of documents. At the February 10 hearing, the parties agreed that discovery would not be disclosed outside their respective staffs.

On February 18, 1997, the court held a hearing on the Government's motion for sanctions based on the dissemination of the Government's discovery, including the identity of its informants and agency reports, which were the cover story of "Processo," a weekly Mexican magazine.[3] Both parties asserted prejudice from the leak and attributed responsibility for the leak to the other party. Judge Atlas stated that she could not make a decision as to the source of leaks based on the current record and that as far as she was concerned the leak was of unknown origin. As a security precaution, the court ordered that the Government witnesses' depositions be taken and filed under seal, without copy to either party. The court, however, did authorize both parties to review the sealed transcript in the courthouse. Although such a limitation was no hardship for the Government, which had offices in the courthouse, Massieu charged that the court-imposed limitation was an enormous burden on his out-of-town counsel. Consequently, on February 26, 1997, he moved to obtain copies of the sealed witness depositions. The court approved

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[3] The article featured an interview with Juan Collado, Massieu's lawyer in Mexico, who received the Government's discovery from Mr. Canales, Massieu's trial attorney.

release of only those portions of informant depositions that the Government designated as no longer necessary to keep under seal.

The following day, February 27, 1997, Massieu moved to exclude evidence obtained after June 15, 1995 (the date the forfeiture complaint was filed). On March 3, 1997, he moved to bifurcate the proceeding into a bench trial to determine probable cause and a subsequent jury trial on defenses to the forfeiture. The court denied the motion but did require that the Government present its hearsay evidence, admissible only for the purposes of probable cause, outside the presence of the jury.

At 5:00 p.m. on March 5, 1997, two business days and less than five full days before trial, the United States disclosed the names of four additional informant witnesses, two of whom would testify at trial. On March 7, Massieu moved to exclude the witnesses. The court denied the motion and limited the depositions of the new witnesses to four hours if in Spanish or three hours if in English.

The jury trial proceeded on March 10, 1997. The morning of trial, the district judge denied Massieu's motion to limit the Government's proof to June 15, 1995, yet informed the parties that she would make two probable cause rulings, one based on the Government's pre-complaint evidence and the other based on the evidence in its entirety.

During trial, the court found that probable cause to forfeit the currency existed both as of June 15, 1995, and as of the forfeiture hearing. The jury returned what appeared to be a mixed verdict, awarding Massieu $1,100,000 despite

having resolved most issues in favor of the Government. On April 25, 1997, the district court granted the Government's motion for judgment as a matter of law and set aside the $1,100,000 jury award. Massieu appeals from that judgment.

II. FACTUAL BACKGROUND

Massieu was Deputy Attorney General of Mexico from June 1993 to January 1994 and then from July 1994 through November 1994. Initially, he was in charge of "delegations," the delegates to the 31 United Mexican States (the equivalent of United States Attorneys).[4] Massieu's duties, however, expanded in August 1993 when the Director of the Mexican Federal Judicial Police (MFJP) began reporting to him.[5]

Sometime after his return to the Attorney General's Office in July 1994, Claimant instructed his associate, Jorge Stergios, to begin special investigations of drug cartel leaders. Stergios sought out Agent Stanley Pimentel of the Federal Bureau of Investigation (FBI), who at that time was assigned as the legal attache to the United States embassy in Mexico City, and requested FBI agency intelligence on drug cartels. Stergios' request was unusual given that the Drug Enforcement Administration, not the FBI, was in charge of drug matters in coordination with the Mexican National Institute to Combat Drugs.

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[4] Jorge Stergios, Massieu's trusted associate, served as a coordinator between Massieu and the delegates.

[5] On August 25, 1993, Adrian Carrera Fuentes was appointed Director of the MFJP.

More than unusual, Stergios' request, in hindsight, was suspect. Earlier in December 1993, Stergios had accompanied Massieu to Houston, where Massieu opened an account at Texas Commerce Bank. Between March 2, 1994, and February 14, 1995, Stergios made 25 cash deposits to Massieu's account, depositing more than $9 million. The currency bundles that Stergios deposited at TCB were secured by paper wrapper, rubber bands, or cellophane. Of the 25 deposits, 18 deposits did not contain any $100 bills; the majority of the currency was in $20 dollar bills.

On March 2, 1995, Massieu was questioned by Mexican authorities. After the interview, he, his wife, and his daughter flew from Mexico to Houston. Their baggage declaration stated that they would be at a Holiday Inn in Houston for three weeks for pleasure. However, the Massieus checked into the Holiday Inn and left the next day.

On March 3, 1995, U.S. Customs Agent Marcy Foreman was contacted by FBI Agent George Smith and asked to maintain a look-out for Massieu. According to Foreman, the request for assistance in locating Massieu originated from the FBI office in Mexico City. In checking flight manifests, Customs determined that Massieu was traveling to Spain via Newark, New Jersey. He was arrested in Newark after he failed to declare the amount of currency he was carrying in excess of $10,000. The charges were later dismissed.

III. DISCUSSION

A. Standing

As a predicate to any action before a federal court, parties must establish that they have proper standing to raise a claim. See United States v. $321,470 in U.S. Currency, 874 F.2d 298, 302 (5th Cir. 1989). The issue of standing is one of law, and review is plenary. See United States v. $38,570 in U.S. Currency, 950 F.2d 1108, 1111 (5th Cir. 1992). "This Circuit has held that the burden of establishing standing to contest forfeiture is on the claimant seeking to come before the court." United States v. One 18th Century Colombian Monstrance, 797 F.2d 1370, 1374-75 (5th Cir. 1986). A claimant need not prove the merit of his underlying claim. See id. He must, however, be able to show at least a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and the "prudential considerations defining and limiting the role of the court." Id. This principle applies to all forfeitures.

The present appeal is complicated by the district court's post-verdict determination that Claimant lacked standing. Prior to trial, Judge Atlas had twice found that Massieu had standing to contest the forfeiture of the $9,041,598.68. It was only after the court submitted the case to the jury, reconciled the jury's facially inconsistent verdict, and granted judgment in favor of the Government as to the entire amount of the defendant currency that the district court inexplicably revisited the issue of Article III standing.

Although we recognize that standing is "an indispensable part of the plaintiff's case" and as such, the

plaintiff must demonstrate standing in "the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation," Meadowbriar Home For Children Inc. v. G.B. Gunn, 81 F.3d 521, 529 (5th Cir. 1996) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, (1992)), we note that a tension exists between a district court's post-verdict, merits-based determination of standing and the requirement that an appellate court review standing as a threshold matter. In finding that Massieu lacked standing, the district court reasoned that the jury's responses to Special Interrogatories 1, 2, and 4--its finding that the $9,041,598.68 in its entirety constituted illegally acquired funds--necessarily negated any theory of ownership which Massieu might have offered. In other words, because the jury believed that all the money was in some way tied to the facilitation of narcotics trafficking, the court reasoned that the jury could not have, at the same time, believed that Massieu had acquired the funds from his family members apart from any illegal conduct.

Because the district court's determination that Massieu did not have standing to contest the forfeiture was based entirely on the jury's verdict, that finding can only be upheld if this Court were to determine: (1) that the district court properly interpreted the jury's responses to the Special Interrogatories as supporting a finding that the total sum of $9 million U.S. currency was tied to illegal narcotics activity, and (2) that none of Massieu's claims on appeal require reversing or invalidating the jury verdict. And so, in the present case, a threshold review of the issue of standing without a consideration of the merits becomes an impossibility. Allowing a district court to revisit the question

of standing post-verdict necessarily invites this Court to chase its tail--we ought review standing as a threshold matter yet in order to do so we must review the merits. For this reason, we consider Judge Atlas' post-verdict discussion of standing as no more than a recognition of the fact that the jury verdict defeated all possible claims of Massieu on the merits, and we find the trial court's earlier determinations that Massieu had standing to be dispositive of that issue.[6]

B. Probable Cause

In a forfeiture action, the Government bears the initial burden of demonstrating probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute. See United States v. One 1986 Nissan Maxima GL, 895 F.2d 1063, 1064 (5th Cir. 1990). The probable cause threshold in this context is the same as that which applies elsewhere: "reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." United States v. $364,960 in United States Currency, 661 F.2d 319, 323 (5th Cir. 1981). The government may prove the requisite probable cause by both circumstantial and hearsay evidence. See One 1986 Nissan, 895 F.2d at 1065. Although this Court reviews the district court's findings of fact for clear error, "[whether] the facts [are] sufficient to constitute probable cause is a question of law," which we review de novo.

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[6] As such, it is unnecessary for this Court to address Massieu's claim on appeal that the district court erroneously granted the Government's Motion for Summary Judgement on the issue of gift.

United States v. 1988 Oldsmobile Supreme, 983 F.2d 670, 674 (5th Cir. 1993).

Here, the Government proceeded to trial on four separate theories of forfeiture. First, the Government argued that the currency represented proceeds of drug trafficking activities in the United States and was thus forfeitable under § 881(a)(6). Second and third, the Government argued that the proceeds were involved in financial transactions in violation of § 1956(a) that occurred in the United States in furtherance of an overarching conspiracy and were thus forfeitable pursuant to § 981. The fourth theory was based on Stergios' transportation of the drug proceeds from Mexico City for deposit to the TCB account, which would again make the money forfeitable under § 981 as involved in an § 1957(a) offense.

Massieu argues first that the Government should have been required to establish probable cause utilizing only that evidence which the Government had obtained prior to June 15, 1995, the date the complaint was filed, and second that the evidence at trial was insufficient to support the district court's findings of probable cause. In denying Massieu's motion to limit the Government's proof to pre-complaint evidence, the district court relied upon United States v. Monkey, 725 F.2d 1007 (5th Cir. 1984). The district court's reliance, however, is misplaced. This Court in United States v. Monkey did not have before it the issue with which we are presently confronted--whether post-complaint evidence is admissible to establish probable cause for forfeiture.

In United States v. Monkey, the Government sought forfeiture of a vessel on the grounds that it was used for

importing controlled substances. See id. The issue before the court in that case was whether probable cause existed for the warrantless seizure and what effect, if any, an unlawful seizure would have on the forfeiture proceeding. See id. at 1011-12. We held that improper seizure does not jeopardize the Government's right to secure forfeiture if probable cause to forfeit the vessel can be supported with untainted evidence. See id. at 1012. The unlawful seizure would only result in the inadmissibility of evidence obtained through the seizure. See id.

The confusion over the precedential effect of the Monkey decision results from the fact that, in finding probable cause for the forfeiture, we explicitly relied on evidence obtained by the Government after the forfeiture complaint was filed. This Court's past reliance on post-complaint evidence, although instructive, is not binding. The issue of the admissibility of post-complaint evidence was not subjected to scrutiny in Monkey. We also note that here, unlike in Monkey, the defendant currency was seized pursuant to a valid warrant, and the Government at no time sought to introduce evidence obtained from the seizure, namely the $9 million U.S. currency.

In the thirteen years since Monkey, we have not addressed the precise issue of whether the Government may rely upon evidence acquired after institution of forfeiture proceedings in showing probable cause. Because this is a matter of first impression in this Circuit, we look to our sister circuits for guidance. At present, there is a split on the issue of the admissibility of post-complaint evidence with respect to the probable cause showing. The Ninth, First, and Eighth Circuits have held that the Government is restricted to

evidence acquired at the time of the complaint, while the Second and Sixth Circuits have reached the opposite conclusion.[7]

In the instant case, however, we do not reach the issue of whether post-complaint evidence is admissible to establish probable cause for forfeiture and, therefore, do not take sides in this circuit conflict. Because the district court separately considered whether probable cause existed as of June 15 and because we agree with its conclusion that probable cause existed as of that date, we address only the district court's finding of probable cause as of June 15, 1995.

The district court based its probable cause determination on the following factual findings:

> First of all, the circumstances of the $9 million . . . . I rely on Jose Nieto's testimony with respect to the manner in which the money

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[7] For the proposition that post-complaint evidence is not admissible, see e.g., United States v. $191,910.00 in United States Currency, 16 F.3d 1051, 1066-67 (9th Cir. 1994); United States v. One Lot of U.S. Currency ($ 36,634), 103 F.3d 1048, 1053-54 (1st Cir. 1997); United States v. Parcels of Property, 9 F.3d 1000, 1003 (1st Cir. 1993); United States v. $ 91,960.00, 897 F.2d 1457, 1462 (8th Cir. 1990).

For the proposition that evidence acquired up to trial could be used to show probable cause, see, e.g., United States v. $ 67,220.00 in United States Currency, 957 F.2d 280, 284 (6th Cir. 1992); United States v. Premises and Real Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1268 (2d Cir. 1989).

was delivered to the bank, the way it was bundled . . . and at least on one or more occasions wrapped in cellophane . . . and that the cash deposits did not contain any 100-dollar bills, in Nieto's experience, was unusual. The cash deposits he said of more than $100,000 were extremely unusual and the number of 20s he found unusual in commercial matters . . . .

Robert Rutt testified that . . . there were different stories given by Stergios and absolutely no documentation for his explanations . . . .

With respect to the TCB deposits . . . within one week . . . three deposits of almost $1 million were made . . . Mr. Massieu was Deputy Attorney General of PGR delegates . . . from June 1993, to January, 1994, and, in March the substantial deposits began . . . The fact that the money was not immediately deposited is not material for the purposes of probable cause . . .

With respect, though, to the timing of the money, in March, 1994, 1.5 million was deposited; in April, 1,650,000; in May, 650,000; in June, 500,000; in August, 300,000 [listing several more deposits]. . .

There is no meaningful explanation to the bankers or the Customs Service for the vast sums of money deposited . . . . And, so, the size of the deposits in such a short period of time in the condition it existed would be one factor to consider on probable cause to believe

the money was drug proceeds . . . .

Mr. Menger testified that he was in the Customs Service and . . . that it was very rare for people to carry over $100,000 and the only people doing so were money exchangers . . .

As to Massieu's taking of payments, the payments--the testimony of Robert Rutt and the matters in which he relied are of great significance. The Court does rely on Agent Munks' work prior to June 15 . . . who met with informants [like] Juan Antonio Ortiz . . . . Munks met with informants and learned that Carrera Fuentes . . . had delivered bribe money from drug traffickers . . . to Massieu . . . . . Munks told Rutt that those informants were reliable. Rutt also said that he had information from an informant in touch with Agent Hanna that drug trafficking organizations in Mexico were paying bribes to Mexican law enforcement, although Mr. Massieu was not specifically mentioned . . . .

The other evidence is Adrian Carrera Funetes' statement . . . [that] implicates Massieu and Stergios having information from traffickers or others with knowledge of the [cocaine] shipment . . . .

Stergios' odd request for assistance and information on the cartels to Pimentel, the FBI Agent . . . was known to the Government prior to June, 1995 . . . .

In sum, while this evidence clearly would be insufficient for any finding other than probable cause . . . it just barely gets over the line as to

> this defendant currency, but I find that it is sufficient as of June 15, 1995.

Record Excerpts, Tab 9, at 1525-1532.

We agree with the district court's conclusion. Our review of the record leaves us with no doubt that the testimony of TCB bank representative Nieto with respect to the manner in which the money was bundled, the testimony of informant Tony Ortiz regarding his first-hand knowledge of the Abrego drug organization's practice of paying bribes to Mexican law enforcement, the hearsay testimony of Agent Rutt that bribe money had been paid from drug traffickers to Massieu, the statement of Adrian Carrera Fuentes implicating Massieu with knowledge of a cocaine shipment, and the records of Massieu's bank deposits revealing substantial cash deposits of largely twenty dollar bills could reasonably support a belief that the seized currency was derived from illicit drug transactions. This Court has found probable cause under less implicating circumstances. See, e.g., United States v. $400,000.00 in United States Currency, 831 F.2d 84 (5th Cir. 1987) (affirming the district court's determination of probable cause on the basis of the defendant's failure to report currency transported into the United States, a lack of evidence of any completed report, and nervousness while currency was being counted). Accordingly, we hold that the district court did not err in finding that the Government's evidence as of June 15 satisfied the requirement of probable cause.

C. Judgment as to Entire Amount of Defendant Currency

Post-verdict judgments as a matter of law are examined de novo. See Fed.R.Civ.P. 50. In reviewing the

district court's decision to grant a judgment as a matter of law, this Court employs the same standard that guided the district court:

> We consider all the evidence with all reasonable inferences in the light most favorable to the party opposed to the motion. If the facts and the inferences point so strongly and overwhelmingly in favor of [the movant] that reasonable jurors could not arrive at a contrary verdict, then the motion was properly granted. If there is substantial evidence--that is, evidence of such quality and weight that reasonable and fair-minded jurors might reach a different conclusion--then the motion should have been denied.

Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir.1994) (citations omitted).

Massieu asserts that the district court erred in denying his Motion For Judgment on Jury Question 5 and in entering judgment in favor of the Government as to the entire amount of the defendant currency. He claims that Judge Atlas disregarded the jury's finding in response to Special Interrogatory Number 5. The Government, in response, argues that the district court did not disregard the jury's response to Special Interrogatory Number 5. Instead, it argues the court attempted to reconcile the apparently inconsistent answers provided by the jury to the five submitted special

interrogatories.[8]

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[8] Question No. 1

Do you find from a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was not the proceeds of and was not used to facilitate drug trafficking activity?

Answer "yes" or "no": ____

Proceed to Question No. 2.

Question No. 2

Do you find from a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was not involved in a financial transaction that was conducted or attempted to be conducted with the intent to promote the carrying on of drug trafficking activity?

Answer "yes" or "no": ____

Proceed to Question No. 3.

Question No. 3

Do you find by a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was not transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity?

Answer "yes" or "no": ____

Proceed to Question No. 4.

Question No. 4

Do you find by a preponderance of the evidence that any one or more of the deposits to the account at Texas Commerce Bank is/are not a monetary transaction in criminally derived property of a value greater than $10,000.00 in United States

currency derived from drug trafficking activity?

Answer "yes" or "no": ____

Proceed to Question No. 5.

Question No. 5

If you have answered "yes" to any of the above questions, then answer Question No. 5. If you have answered "no" to all of the above questions, then do not answer Question No. 5.

Question No. 5

To the extent, and only to the extent, you have found in answer to the foregoing questions that all or part of the defendant $9,041,598.68, if any, was:

- money used to facilitate drug trafficking activities or the proceeds of drug trafficking activities;

- a financial transaction that was conducted or attempted to be conducted with the intent to promote the carrying on of drug trafficking activity;

- money transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity; and/or,

- monetary transaction(s) in criminally derived property of a value greater than $10,000.00 in United States currency derived from drug trafficking activity,

what amount of the Defendant $9,041,598.68, if any, do you find from a preponderance of the evidence was from a source other than the above sources?

This Circuit has long held that a district court judge has a duty to attempt to reconcile a jury's apparently inconsistent responses to special interrogatories. See Davis v. West Community Hosp., 755 F.2d 455, 465 (5th Cir. 1985). Federal district courts are granted considerable latitude in interpreting special interrogatories because a judge is in the best position "to analyze the jury's intention and thus is charged, in the first instance, with the obligation of giving effect to those intentions in light of the surrounding circumstances." P & L Contractors, Inc. v. American Norit Co., Inc., 5 F.3d 133, 138 (5th Cir. 1993) (citing McVey v. Phillips Petroleum Co., 288 F.2d 53, 59 (5th Cir. 1961)).

In the present case, the district court properly exercised its discretion by adopting a view of the case which made the jury's answers consistent. See, e.g., Mercer v. Long MFG. N.C., Inc., 671 F.2d 946, 948 n.1 (5th Cir. 1982) (explaining that "[i]f there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly"). In order to give proper effect to all of the jury's responses, the court had to reconcile the jury's negative responses to Questions No. 1, 2, and 4, indicating that all of the defendant currency came from drug-related sources, with the jury's answer to Special Interrogatory Number 5 which could be construed as awarding Claimant $1,100,000. Because the jury was not to answer Question No. 5 unless it had answered "yes" to any of the previous interrogatories, the court properly reasoned that the jury's answer to Question No. 5 served as an explanation of its answer to Question No. 3, the only interrogatory to

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Answer in dollars and cents: ____

which the jury had answered "yes." According to the court, the response to Special Interrogatory Number 5 therefore only indicated that Massieu proved to the jury's satisfaction that $1,100,000 was not money "transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity," as referenced in Question No. 3. Thus, the court reasoned that because the answer of $1,100,000 to Question No. 5 applied to only one of the government's four theories of forfeiture, it was academic and Massieu was not entitled to the $1,100,000.

Furthermore, Judge Atlas properly reconciled the jury's responses "in light of the surrounding circumstances, including the instructions of the court." Davis v. West Community Hosp., 755 F.2d 455, 465 (5th Cir. 1985). Here, the court supplied the parties with a copy of the "Court's Instructions to the Jury" and the Verdict Form prior to closing arguments. The Government and Massieu both argued directly from the Verdict Form during their closing arguments, going so far as to indicate to the jury whether they desired a "yes" or "no" response to each question. For these reasons, Judge Atlas upheld the jury verdict and entered judgment in favor of the Government as to the entire $9,041,598.68.

Because we find the district court's reconciliation persuasive, we hold that the district court properly denied Massieu's Motion For Judgment on Jury Question 5 and properly entered judgment in favor of the Government as to the entire amount of the defendant currency.

D. Due Process

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The established rule is that claimants whose property is subject to forfeiture are entitled to due process including the right to reasonable notice of the basis on which forfeiture is sought and a reasonable opportunity to defend. See United States v. James Daniel Good Real Property, 510 U.S. 43, 48-63, 114 S. Ct. 492, 498-506, (1993); United States v. Marsh, 105 F.3d 927, 930-31 (5th Cir. 1997). This Court has held, "[w]here the Government seeks the traditionally disfavored remedy of forfeiture, due process protections ought to be diligently enforced, and by no means relaxed . . . ." Armandariz-Mata v. U.S. Dept. of Justice, 82 F.3d 679, 683 (5th Cir.) cert denied, 117 S. Ct. 317 (1996).

Massieu submits that the district court's discovery and procedural rulings, either individually or cumulatively, deprived him of due process and asks this Court to review those rulings de novo. Massieu, however, provides no authority for altering the usual abuse of discretion standard. We note that a ruling which does not rise to the level of an abuse of discretion cannot alone constitute a due process deprivation. Therefore, the appropriate standard of review for the individual discovery and procedural rulings remains an abuse of discretion. See Mills v. Beech Aircraft Corp., 886 F.2d 758, 761 (5th Cir. 1989).

Moreover, Massieu requests that this Court utilize a cumulative error analysis. Such an approach, however, is employed only in those cases where individual rulings are

erroneous--where the appellant has " . . . [some]thing to cumulate." Derden v. McNeel, 938 F.2d 605, 609 (5th Cir. 1991) (applying cumulative error analysis in the context of a habeas proceeding). In Massieu's view, the district court committed reversible error in denying his request for an unredacted copy of the seizure affidavit (in order to seek suppression), conducting ex parte examination of Government exhibits presented in support of its application for stay, failing to exclude testimony of last-minute Government witnesses, and failing to bifurcate the trial. We shall examine each of these claims of error in turn.

1. Denial of request for unredacted copy of the seizure affidavit.

Massieu argues that the district court erred in denying his request for an unredacted copy of the court-sealed seizure affidavit. He claims that without access to the affidavit he was unable to ascertain the basis for the seizure in order to contest its legality. Massieu's claim lacks merit. First, Federal Rule of Civil Procedure 26(c) provides for the sealing of records upon a showing of "good cause" by the moving party. Fed.R.Civ.P. Rule 26(c). A corollary to Rule 26(c) is that, once a district court has sealed a document, it is well within its discretion to deny a party's request for an unredacted copy of that same document. Second, even assuming arguendo an "illegal" seizure of the defendant currency, because the Government did not seek to introduce the actual currency at trial, there was no evidence in the present case that Massieu could have sought to suppress. See United States v. Monkey, 725 F.2d 1007, 1011-12 (5th Cir. 1984) (explaining that a lack of probable cause for the seizure would "only result in the suppression of evidence obtained by the wrongful seizure

and would have no further bearing on the forfeitability of the property."). Accordingly, Massieu cannot show any prejudice to his "substantial rights" that would justify reversal. See Fed.R. Civ.P Rule 61.

2. *Ex parte* examination of materials in support of application for stay.

Generally, the power to stay a pending matter derives from a trial court's wide discretion to control the course of litigation. In the present case, however, this inherent discretion has been explicitly circumscribed by statute. The plain language of both 18 U.S.C. § 981(g) and 21 U.S.C. § 881(i) requires a district court to find two elements in order to grant a stay: (1) that forfeiture proceedings be "related to" an offense for which there has been an indictment,[9] and (2) that the Government show "good cause" for the stay. See In re Ramu, 903 F.2d 312, 319 (5th Cir. 1990) (considering appropriateness of stay in context of 21 U.S.C. § 881(i)). Fifth Circuit precedent additionally mandates that a district court make express findings of fact and conclusions of law concerning the existence of the statutory prerequisites. See Id.

The district court granted a stay of litigation until the conclusion of the Abrego trial on the basis of oral argument by both the Government and Massieu, as well as two sealed affidavits which the court examined *ex parte*. Massieu argues that the district court's denial of his request for copies of the

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[9] 21 U.S.C. § 881(i) requires that the indictment be for a drug offense. 18 U.S.C. § 981(g) mandates that the indicted offense be a violation of federal, state, or local law.

two sealed affidavits deprived him of the opportunity to rebut meaningfully the contentions of the Government at the May 31, 1996, hearing.

It is well established in this Circuit that district courts have an inherent power to receive in camera evidence and place such evidence under seal. See United States v. De Los Santos, 810 F.2d 1326, 1331-1333 (5th Cir. 1987). In the criminal context, we have recognized that the receipt of evidence ex parte permits the court to balance the interests of the Government--in safeguarding its confidential informants and in ensuring the viability of its ongoing investigations--against the interests of defendants in confronting adverse witnesses. See United States v. Singh, 922 F.2d 1169, 1172 (5th Cir. 1991) (holding that district court's in camera review was appropriate, and that furnishing the appellant with a copy of the transcript of that review "would defeat the very purpose of the in camera procedure."). Unlike criminal defendants, civil forfeiture claimants are not afforded the protections of the Sixth Amendment's Confrontation Clause. See Austin v. United States, 509 U.S. 692, 608 n.4, 113 S. Ct. 2801, 2804 n.4,(1998). As a result, submission of evidence *ex parte* is more readily justified in a civil forfeiture action than in a criminal case.

Because courts routinely balance the interests of the Government in anonymity against that of civil litigants in full disclosure and have permitted the submission of evidence *ex parte*, see, e.g., Abell v. Potomac Insurance Co., 858 F.2d 1104, 1143 (5h Cir. 1988), vacated on other grounds, 492 U.S. 914, 109 S. Ct. 3236 (1989) (sealing the record of in camera discussions with FBI agent about attempts to bribe jury members); In re Grand Jury Witness, 835 F.2d 437, 441

(2d Cir. 1988) (permitting Government to file a sealed *ex parte* affidavit and to adjourn to chambers for *ex parte* discussion in closed civil contempt hearing), we find no abuse of discretion in the present case.

Moreover, Massieu has not demonstrated any prejudice to his "substantial rights" that resulted from the imposition of the stay. See Fed.R. Civ.P Rule 61. In particular, it is interesting to note that less than one month after he unsuccessfully sought a writ of mandamus from this Court to be relieved of the hardship of what he deemed court-indulged blanket non-disclosure by the Government, Massieu moved the district court for a speedy trial. Upon agreement of the parties, the case was set for trial on March 10, 1997, approximately three months following the district court's lift of the stay.

3. Failure to exclude testimony of last-minute witnesses.

Massieu's next point of error is that the district court erred in failing to exclude the trial testimony of Cesar Dominguez[10] and Raul Macias,[11] who were two of the four

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[10] Cesar Dominguez was a city policeman commissioned by the MFJP until 1995. As a police officer assigned to the MFJP, Dominguez would deliver "quotas" (payoffs in the form of either cash or drugs) from drug traffickers to the MFJP office. He testified that drug traffickers also delivered money to the office in boxes, briefcases, or bags. The money was wrapped in cellophane or secured by rubber bands. The most money Dominguez was involved in counting was a little more than $6 million.

Beginning in 1991, Dominguez began working for the Amado Carillo Fuentes organization. In 1993, Dominguez on four

prospective witnesses that the Government disclosed less than five full days before trial. According to Massieu, the last-

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different occasions transported money to the airport. Once at the airport the money would be loaded onto a plane belonging to the Attorney General's office. While Dominguez was a police officer, money continued to be brought to the airport destined for the Attorney General's office regardless of who held the position. Dominguez quit in 1995 because over 17 of his co-workers were murdered.

[11] Raul Macias was a police officer in Mexico from 1989 to 1995. In 1994, he was assigned to work under the direction of Commander David Grajeda Lara in Zacatecas, Mexico. Macias testified that on August 4, 1994, an airplane loaded with cocaine landed at an airstrip near the city of Sombrerete, Mexico, where the cocaine was unloaded and taken to the local MFJP's office in two trucks. At the office the cocaine was weighed. Eight tons of the approximately 10 tons of cocaine were loaded into a truck and driven away by Commander Lara under escort. The remaining two tons along with bricks of fake cocaine were taken elsewhere and burned the next day.

Macias returned to the airport that same night and observed approximately 15 Suburbans parked near the airport entrance. Lara instructed Macias to load 12-15 suitcases into Lara's Suburban. While guarding two of the suitcases at a hotel that night, Macias opened the suitcases and saw that they contained United States Currency in denominations of 50's, 20's, and 10's.

The following day, Lara picked up Macias, the suitcases, two other agents and they went to Mexico City. The next morning the men drove to the offices of the MFJP where Lara began talking to the passenger of a blue Marquis. Lara signaled to Macias, who took the suitcases with the currency from the Suburban and placed them in the trunk of the Marquis. Macias recognized the passenger who Lara was speaking with in the blue Marquis as Massieu.

minute witness disclosure violated Federal Rule of Civil Procedure 26(a)(3)(A)[12] and should have prompted mandatory exclusion under Rule 37. Specifically, he complains that the late disclosure forced inadequate depositions of other witnesses and precluded investigation of the witnesses' allegations as well as development of impeachment and rebuttal testimony.

Federal Rule of Civil Procedure 37(c)(1) provides that a party who "without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed.R. Civ.P. 37(c)(1). In determining whether a violation of Rule 26(a) or (e)(1) is harmless, the trial court's discretion is to be guided by the consideration of four factors: (1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness. See Bradley v. United States, 866 F.2d 120, 125 (5th Cir. 1989).

We uphold the district court's decision not to exclude the witness testimony. First, the applicable standard of review

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[12] According to Rule 26(a)(3)(A), a party shall provide to other parties the name, address, and telephone number of each witness that it may present at trial other than solely for impeachment purposes, "separately identifying those whom the party expects to present and those whom the party may call if the need arises . . . ." Fed.R. Civ.P. Rule 26(a)(3)(A).

for a trial court's decision in a matter relating to discovery is abuse of discretion. See Harris v. Amoco Production Co., 768 F.2d 669, 684 (5th Cir. 1985). We will not substitute our judgment for that of Judge Atlas; instead, we must only decide whether the district court "could have entered the order which [it] did." See id. Second, neither Rule 37 and the Advisory Committee Notes to Rule 37 nor Fifth Circuit case law requires that a district court make express findings of fact or conclusions of law concerning the existence of substantial justification or harmless failure to disclose. Accordingly, Judge Atlas' statements in open court on March 10, 1997, regarding witness safety concerns and minimal prejudice as well as the reasons asserted by the Government in justification for its three week delay in providing the discovery, which was nonetheless disclosed in advance of trial, are sufficient to support the district court's determination that Rule 37 sanctions were not in order.[13]

4. Failure to bifurcate the trial.

A motion to bifurcate "is a matter within the sole discretion of the trial court, and we will not reverse the court's decision absent an abuse of that discretion." First Tex. Sav. Ass'n v. Reliance Ins. Co., 950 F.2d 1171, 1174 n.2 (5th Cir. 1992). Massieu asserts that the district court abused its discretion when it failed to bifurcate the proceeding into a

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[13] Before the district court, the Government justified its tardy disclosure of Cesar Dominguez and Raul Macias as follows: (1) the loss of anticipated trial witnesses as a result of the leaked "Processo" story and (2) the difficulty in arranging the lawful entrance of Dominguez and Macias, both Mexican citizens, into the United States.

bench trial to determine probable cause and a subsequent jury trial on defenses to the forfeiture. Massieu argues that, as a result of the one proceeding, hearsay evidence offered to show probable cause was placed before the jury. According to Massieu, the admission of this otherwise inadmissible evidence was highly prejudicial and deprived him of a fair trial.

Massieu's argument is without merit. Judge Atlas restricted hearsay before the jury to only those instances where an exception under Rules 803 or 804 of the Federal Rules of Evidence applied. All hearsay, which was not otherwise admissible but for purposes of probable cause, was heard outside the presence of the jury. Accordingly, the district court's failure to bifurcate Massieu's forfeiture proceeding was not an abuse of discretion.

5. 0 + 0 + 0 + 0 =0

In order for cumulative error analysis to apply, Massieu must have " . . . [some]thing to cumulate." Derden v. McNeel, 938 F.2d at 609. Because the foregoing analysis has revealed no ground for reversal, he has nothing to cumulate. Accordingly, we deny Massieu relief on his cumulative due process claim.

E. Admissibility of Ortiz and Iglio Testimony

Massieu additionally claims that the district court erred in admitting the testimony of two witnesses: Government informant "Tony" Ortiz and money laundering expert Agent Vincent Iglio. Evidentiary rulings are accorded considerable deference on appeal; "error may not be predicated upon a

ruling which admits or excludes evidence unless a substantial right of the party is affected." Fed.R. Evid. 103(a); see General Electric Co. v. Joiner, 118 S. Ct. 512, (1997); Mills v. Beech Aircraft Corp., 886 F.2d 758 (5th Cir. 1989). We first examine the testimony of Tony Ortiz.

1. Testimony of Tony Ortiz

Massieu argues that the district court erred by failing to exclude "Tony" Ortiz's testimony and that the admission of such testimony invited the conclusion that all Mexican law enforcement officials are corrupt. Specifically, he asserts that Ortiz's testimony was irrelevant and unfairly prejudicial. See Fed.R. Evid 402 and 403.

At trial, Ortiz testified about the payment of drug proceeds to Mexican officials for the purpose of facilitating the movement of cocaine through Mexico into the United States. He explained that he had joined the Juan Garcia Abrego drug trafficking organization in 1989 and had been in charge of a transportation arm of the organization until his arrest in 1993. According to Ortiz, his job included responsibility for transporting cocaine from Brownsville to Houston and then to New York as well as responsibility for transporting the drug proceeds from the United States to Matamoros, Mexico.

Ortiz also testified that his ability to move drugs without incident in Mexico depended upon paying commandants and other Mexican officials. He testified that there were times that he would have to wait for cocaine to arrive in Brownsville because the commandants of the district had not yet been paid. According to Ortiz, when

commandants changed, payment would not stop. Other arrangements would be made. As to the mode of payment, Ortiz explained that commandants would be paid from the drug proceeds which Ortiz would collect in the United States. He testified that he knows that Abrego continued to move cocaine after Ortiz's arrest and that the only way to stay in business was to pay bribes "all the way to the top."

Rule 401 of the Federal Rules of Evidence defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R. Evid. 401. Rule 403, however, provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Fed.R. Evid. 403. In United States v. Pace, 10 F.3d 1106, 1115-16 (5th Cir. 1993), the Fifth Circuit explained, however, that "[u]nless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Id.

There is no doubt that the testimony of Tony Ortiz was relevant to the forfeiture proceeding. Under 18 U.S.C. § 981(a)(1), the seized currency would be forfeitable if it was involved in a transaction violating 18 U.S.C. § 1956. With regard to § 1956(a)(2)(A), the Government must demonstrate that there was a transportation or transfer or attempt to transfer "monetary instruments or funds from a place . . . outside the United States to a place inside the United States

with the intent to promote the carrying on of specified unlawful activity." Ortiz's testimony was relevant to whether money and cocaine readily flowed between Mexico and the United States and that some Mexican officials were given pay-offs in order to facilitate narcotics trafficking. Additionally, Ortiz provided first-hand knowledge about the operation of the Abrego drug organization--one of the groups from which the Government alleged Massieu received pay-off money. In order for the district court to properly find Ortiz's testimony to be relevant, it was not necessary for Ortiz to provide the conclusive link between Abrego and Massieu.

Furthermore, Ortiz's testimony was not so unfairly prejudicial that it should have been excluded. In conducting an inquiry into the prejudicial effect of contested testimony, we have recognized that "testimony presented by the Government will invariably be prejudicial to a criminal defendant or forfeiture claimant. But Rule 403 only excludes evidence that would be unfairly prejudicial to the defendant." United States v. Townsend, 31 F.3d 262, 270 (5th Cir. 1994). While there is no doubt that Tony Ortiz's testimony was harmful to Massieu, its prejudicial effect did not substantially outweigh its probative value.

For the reasons stated above in analyzing the relevance of Ortiz's testimony, the district court properly found that it was not unfairly prejudicial.

2. Testimony of Vincent Iglio.

Claimant next argues that the district court erred by admitting the testimony of Vincent Iglio as an expert on money laundering. Massieu does not contest Iglio's

qualifications to testify as an expert, rather he asserts that Iglio's testimony constituted inadmissible legal conclusion. See Fed.R. Evid 702 and 704.

The admission or exclusion of expert testimony will not be disturbed on appeal unless it is "manifestly erroneous." First Natl. Bank of Durant v. Trans Terra Corp. Intl., 142 F.3d 802, 811 (5th Cir. 1998). Rule 702 of the Federal Rules of Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed.R. Evid. 702. With regard to the permissible scope of expert testimony, Rule 704 explicitly provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed.R. Evid. 704. This Court, however, has repeatedly held that Rule 704 does not allow an expert to render conclusions of law. See Snap-Drape, Inc. v. Commissioner of Internal Revenue, 98 F.3d 194 (5th Cir.1996).

Massieu charges that Iglio's statement to the jury--that the testimony he had heard so far in the case was consistent with money laundering--supplanted Iglio's judgment for their own. Where an expert's trial testimony included the bases for the expert's conclusion, and the conclusion was supported by the overwhelming evidence, as is true in the present matter, Fifth Circuit case law supports a determination that there was not significant risk that the expert's testimony "supplant[ed the] jury's independent exercise of common sense." United States v. Willey, 57 F.3d 1374, 1389 (5th Cir. 1995) (quoting

Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1055 (4th Cir.1986)). We find no error in allowing Iglio's testimony.

Cases from the Fourth and Eighth circuits bolster the determination that the district court properly allowed Agent Iglio to testify. The Fourth and Eighth Circuits when confronted with the admissibility of expert testimony on questions involving money laundering each found that such testimony was admissible and did not present problems of experts acting as an additional juror. See United States v. Barber, 80 F.3d 964 (4th Cir. 1995) (noting that the district court did not abuse its discretion in allowing the Government's agent to testify and explain how the defendant's activities constituted concealment for purposes of money laundering); United States v. Acty, 969 F.2d 652 (8th Cir. 1992), aff'd on other grounds, 511 U.S. 513, 114 S. Ct. 1747 (1994) (admitting, as permissible under rule 704(a), expert testimony that deposited checks affect interstate commerce under § 1956(a)(1)(B), that banks into which defendant deposited money were financial institutions under statute and that defendant's activities constituted concealment of money under § 1956(a)(1)(B)). Accordingly, we hold that the district court properly admitted the expert testimony of Agent Vincent Iglio.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed February 18, 1999]

No. 97-20413

Appeal from the United States District Court
for the Southern District of Texas, Houston

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
$9,041,598.68 (NINE MILLION FORTY ONE THOUSAND, FIVE HUNDRED NINETY EIGHT DOLLARS AND SIXTY EIGHT CENTS), *Defendant*,	)
MARIO RUIZ MASSIEU, *Claimant-Appellant*.	)

ON PETITION FOR REHEARING

Before JOLLY, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX E

ARTICLE V - UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

CHAPTER 46. FORFEITURE

18 USCS § 981

§ 981. Civil forfeiture

(a)(1)Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a

term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or a violation of section 1341 or 1343 of such title affecting a financial institution.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of--

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud), if such violation relates to the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of--

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(2) No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

(b)(1) Any property--

(A) subject to forfeiture to the United States under subparagraph (A) or (B) of subsection (a)(1) of this section--

(i) may be seized by the Attorney General; or

(ii) in the case of property involved in a violation of section 5313(a) or 5324 of title 31, United States Code, or section 1956 or 1957 of this title investigated by the Secretary of the Treasury or the United States Postal Service, may be seized by the Secretary of the Treasury or the Postal Service; and

(B) subject to forfeiture to the United States under subparagraph (C) of subsection (a)(1) of this section may be seized by the Attorney General, the Secretary of the Treasury, or the Postal Service.

(2) Property shall be seized under paragraph (1) of this subsection upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when--

(A) the seizure is pursuant to a lawful arrest or search; or

(B) the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, has obtained a warrant for such seizure pursuant to the Federal Rules of Criminal Procedure, in which event proceedings under subsection (d) of this section shall be instituted promptly.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject

only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may--

(1) place the property under seal;
(2) remove the property to a place designated by him; or
(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine--

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency--

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) in the case of property referred to in subsection (a)(1)(C), restore forfeited property to any victim of an offense described in subsection (a)(1)(C); or

(7) In the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service, pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service, may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the

appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g) The filing of an indictment or information alleging a violation of law, Federal, State or local, which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding.

(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(i)(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the

Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country

concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

(j) For purposes of this section--

(1) the term "Attorney General" means the Attorney General or his delegate; and
(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

* * *

APPENDIX G

19 USCS § 1615

§ 1615. Burden of proof in forfeiture proceedings

In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel, vehicle, or aircraft, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

June 17, 1930, ch 497, Title IV, Part V, § 615, 46 Stat. 757; Aug. 5, 1935, ch 438, Title II, § 207, 49 Stat. 525; Oct. 3, 1978, P.L. 95-410, Title I, § 110(d), 92 Stat. 896

APPENDIX H

21 USCS § 881

§ 881. Forfeitures

(a) Subject property.

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that--

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner,

by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure.

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when--

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General.

Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may--

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable.

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for

violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property.

(1) Whenever property is civilly or criminally forfeited under this title the Attorney General may--

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291j(b) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this title shall be used to pay--

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, United States Code, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, United States Code, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)--

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(4)(A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for

purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority established in paragraph (1)(B).

(B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this title, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State in which the property is located, may transfer title to the property to the State, either without charge or for a nominal charge, through a legal instrument providing that--

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

(f) Forfeiture and destruction of schedule I and II substances.

(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into

the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) which cannot be separated safely from such raw materials or products under such circumstances as the Attorney General may deem necessary.

(g) Plants.

(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this title, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest,

carry off, or destroy such plants.

(h) Vesting of title in United States.

All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil forfeiture proceedings.

The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue.

In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(k)[Omitted]

(l) Agreement between Attorney General and Postal Service for performance of functions.

The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.